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## PREFACE.

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UNLAWFUL aggression is never so dangerous as when it takes place under colour of judicial process; hence it has been the care of the law to provide various remedies to check the exercise by Courts of powers which do not appertain to them. The most widely known remedy to restrain this evil is, perhaps, the writ of *habeas corpus*, which operates to deliver out of custody a person illegally detained. But this remedy cannot be called in aid until after the evil has been committed and the unlawful detention has been actually undergone.

The writ of prohibition, on the other hand, is less appreciated by reason of its very efficacy. For while the writ of *habeas corpus* goes to remedy a wrong already done, prohibition operates to restrain the aggressor before the intended mischief is carried into effect. The necessity for such a remedy was perceived at least as early as the third year of Edward I., when "a prohibition was granted and after an attachment against the bishop and the official for holding plea after the prohibition": 3 E. 1. Rot. Clausarum, M. 10.

In later times, owing perhaps to the jealousy with which the encroachments of the Spiritual Courts were regarded, the writ was employed with such frequency as to lead in the reign of James I. to the remonstrance of the clergy, known as *Articuli Cleri*, a remonstrance that proved ineffectual.

That the decisions on a writ of such antiquity and calling for such frequent application should not be wholly harmonious was perhaps to be expected, and so conflicting did opinions as to the principles on which the remedy should be administered become,

that we find Lord Denman saying : " There is no title in our law under which, if we look to the facts appearing in the several cases, more confusion and contradiction may be found. If we were from these bound to lay down a practical rule for arranging by classes where the writ ought to be refused and where granted, the difficulties of the task might probably be found insurmountable " : *Burder v. Veley* (12 A. & E., at p. 256).

In view of the fact that in the modern Digests many valuable decisions on the law of prohibition are concealed by being assigned to the heading of the Courts to which the writ happened to have been granted, and that previous writers on the subject have grouped the decisions on a similar scheme of classification (the result being that cases exactly *in pari materia* have to be sought on widely separated pages), it seemed to us that there was scope for a treatise in which the decisions might be presented in a more convenient method of arrangement. The Table of Contents shows the mode in which we have endeavoured to carry out this object.

In the collection of the cases, many were found which are no longer law, as, for instance, cases decided on the jurisdiction of Courts which have ceased to exist, or the jurisdiction of which has been enlarged, or the procedure of which has been changed. These decisions, however, still remain as valuable expositions of the principles of Prohibition, and have been retained for that reason. But it must be steadily borne in mind that the book professes to be no more than a work on Prohibition, and lays no claim to being a treatise on the jurisdiction or practice of inferior Courts.

The so-called Statutory Prohibition, which forms the subject of Part II. of the book, is unknown in England. In dealing with this subject, again, we have retained many decisions which throw light on the matter treated of, though such decisions may not be law on the main question on which they were decided.

In view of the fact that the authorities cited are decisions of the Courts of England and Ireland, of the High Court of Australia, of the Supreme Courts of the six States of the Australian Commonwealth, and of the Supreme Court and the Court of



Appeal of the Dominion of New Zealand, the facts of the cases have been set out in more than usual detail, and extensive quotations have been given from the judgments. By this means it is hoped that the work will be rendered more useful to those practitioners to whom the original Reports are not available.

H. R. C.

D. S. E.



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A.C....	...	...	Law Reports Appeal Cases	...	...	...	England.
A. & E.	...	...	Adolphus & Ellis	...	...	...	England.
A.J.R.	...	...	Australian Jurist Reports	...	...	...	Victoria.
A.L.R.	...	...	Argus Law Reports	...	...	...	Victoria and High Court of Aus- tralia.
A.L.R. (C.N.)	...	...	Argus Law Reports (Current Notes)	...	...	...	Victoria.
A.L.T.	...	...	Australian Law Times	...	...	...	Victoria.
A.R.	...	...	Industrial Arbitration Reports	...	...	...	New South Wales.
Aleyn	...	...	Aleyn	...	...	...	England.
Arn. & H.	...	...	Arnold & Hodges	...	...	...	England.
Asp. M.C. or Mar. Cas.	...	...	Aspinall Maritime Cases	...	...	...	England.
Atk.	...	...	Atkyns	...	...	...	England.
B. & Ad...	...	...	Barnewall & Adolphus	...	...	...	England.
B. & Ald.	...	...	Barnewall & Alderson	...	...	...	England.
B. & C.	...	...	Barnewall & Cresswell	...	...	...	England.
B.C.R. or Rep.	...	...	Saunders & Cole Bail Court Reports and Brisbane Courier Reports	...	...	...	England. Queensland.
B. & P.	...	...	Bosanquet & Puller	...	...	...	England.
B.N.P.	...	...	Buller's Nisi Prius	...	...	...	England.
B. & S.	...	...	Best & Smith...	...	...	...	England.
Bae.Abr.	...	...	Bacon's Abridgement	...	...	...	England.
Barn. K.B.	...	...	Barnardiston King's Bench	...	...	...	England.
Beav.	...	...	Beavan	...	...	...	England.
Bing.	...	...	Bingham	...	...	...	England.
Bligh N.S.	...	...	Bligh New Series	...	...	...	England.
Br. & B.	...	...	Broderip & Bingham	...	...	...	England.
Bro. P. C.	...	...	Brown Cases in Parliament...	...	...	...	England.
Bulst.	...	...	Bulstrode	...	...	...	England.
Bunb.	...	...	Bunbury	...	...	...	England.
Burr.	...	...	Burrows	...	...	...	England.
C.A.	...	...	Court of Appeal, New Zealand (Johnston)	...	...	...	New Zealand.
C.B.	...	...	Common Bench	...	...	...	England.
C.B.N.S.	...	...	Common Bench New Series	...	...	...	England.
C.D.	...	...	Law Reports Chancery Division	...	...	...	England.
C. & K.	...	...	Carrington & Kirwan	...	...	...	England.
C.L.R.	...	...	Common Law Reports	...	...	...	England.
			Commonwealth Law Reports	...	...	...	High Court of Australia.
C.M. & R.	...	...	Crompton Meeson & Roscoe	...	...	...	England.
C.P.D.	...	...	Law Reports Common Pleas Division	...	...	...	England.
Cab. & Ell. (or E.)	...	...	Cababé & Ellis	...	...	...	England.
Ca. t. Hardw.	...	...	Cases <i>tempore</i> Hardwicke	...	...	...	England.
Carth.	...	...	Carthew	...	...	...	England.
Ch.	...	...	Law Reports Chancery	...	...	...	England.
Cl. & F.	...	...	Clark & Finelly	...	...	...	England.
Col. L.J.	...	...	Colonial Law Journal (W. P. Reeves)	...	...	...	New Zealand.
Com. Dig.	...	...	Comyn's Digest	...	...	...	England.

Comb. ...	Comberbach ...	England.
Cowp. ...	Cowper ...	England.
Cox C.C. ...	Cox Crown Cases ...	England.
Cro. Car. ...	Croke (Charles) ...	England.
Cro. Eliz. ...	Croke (Elizabeth) ...	England.
Cro. Jac. ...	Croke (James) ...	England.
D. & L. ...	Dowling & Lowndes ...	England.
D. & M. ...	Davison & Merivale ...	England.
D.P.C. ...	Dowling Practice Cases ...	England.
D. & R. ...	Dowling & Ryland ...	England.
Doug. ...	Douglas ...	England.
Dowl. N.S. ...	Dowling Practice Cases New Series ...	England.
Dow. & Cl. ...	Dow & Clark ...	England.
E. & B. ...	Ellis & Blackburn ...	England.
E. & E. ...	Ellis & Ellis ...	England.
East ...	East ...	England.
Eq. ...	Law Reports Equity ...	England.
Ex. ...	Exchequer ...	England.
Ex. D. ...	Law Reports Exchequer Division ...	England.
F.N.B. ...	Fitzherbert's Natura Brevium ...	England.
G. & D. ...	Gale & Davison ...	England.
Gale ...	Gale ...	England.
Gaz. L.R. ...	New Zealand Gazette Law Reports ...	New Zealand.
Godb. ...	Godbolt ...	England.
Gow ...	Gow ...	England.
H. Bl. ...	Henry Blackstone ...	England.
H. & C. ...	Hurlstone & Coltman ...	England.
H.L.C. ...	House of Lords Cases ...	England.
H. & N. ...	Hurlstone & Norman ...	England.
H. & W. ...	Harrison & Wollaston ...	England.
Hardres ...	Hardres ...	England.
Het., or Hetley ...	Hetley ...	England.
Hob. ...	Hobart ...	England.
Ir. Ch. R. ...	Irish Chancery Reports ...	Ireland.
Ir. R. ...	Irish Reports ...	Ireland.
Ir. R. Eq. ...	Irish Reports Equity ...	Ireland.
J. P. ...	Justice of the Peace ...	England.
Jur. (N.S.) ...	Jurist (New Series) ...	England.
Jur. (O.S.) ...	Jurist (Old Series) ...	England.
[1901] K.B. ...	Law Reports King's Bench, 1901 (onwards) ...	England.
Kebl. ...	Keble ...	England.
Kel. ...	Kelyng ...	England.
Kn. or Knox ...	Knox ...	New South Wales.
L.J. Bey. ...	Law Journal Bankruptcy ...	England.
L.J.C.P. ...	Law Journal Common Pleas ...	England.
L.J.Ch. ...	Law Journal Chancery ...	England.
L.J.Ex. ...	Law Journal Exchequer ...	England.
L.J.K.B. ...	Law Journal King's Bench ...	England.
L.J.M.C. ...	Law Journal Magistrates' Cases ...	England.
L.J. (O.S.) C.P. ...	Law Journal (Old Series) Common Pleas ...	England.
L.J. (O.S.) K.B. ...	Law Journal (Old Series) King's Bench ...	England.
L.J.P. ...	Law Journal Probate ...	England.
L.J.P.C. ...	Law Journal Privy Council ...	England.
L.J.Q.B. ...	Law Journal Queen's Bench ...	England.
L.M. & P. ...	Lowndes, Maxwell & Pollock ...	England.
L.R.C.P. ...	Law Reports Common Pleas ...	England.
L.R.E. & L. ...	Law Reports House of Lords ...	England.
L.R.Eq. ...	Law Reports Equity ...	New South Wales.
L.R.H.L. ...	Law Reports House of Lords ...	England.
L.R. (Ir.) ...	Law Reports Ireland ...	Ireland.
L.R. (N.Z.) ...	Law Reports, New Zealand ...	New Zealand.
L.R.P.C. ...	Law Reports Privy Council ...	England.
L.R.Q.B. ...	Law Reports Queen's Bench ...	England.



L.T. ...	Law Times ...	England.
L.T.O.S. ...	Law Times Old Series ...	England.
Latch ...	Latch ...	England.
Ld. Ken. ...	Lord Kenyon ...	England.
Ld. Ray. ...	Lord Raymond ...	England.
Legge ...	Legge ...	New South Wales.
Leon. ...	Leonard ...	England.
Lev. ...	Levinz ...	England.
Litt. ...	Littleton ...	England.
M. & G. ...	Manning and Granger ...	England.
M. & H. ...	Murphy & Hurlstone ...	England.
M. & Ry. ...	Manning & Ryland ...	England.
M. & S. ...	Maule & Selwyn ...	England.
M. & W. ...	Meeson & Welsby ...	England.
Mac. or Macassey	Macassey ...	New Zealand.
Mad. ...	Maddock ...	England.
Mad. & Gel. ...	Maddock & Geldart ...	England.
Mans. ...	Manson ...	England.
March ...	March ...	England.
Mod. ...	Modern Reports ...	England.
Moo. P. C. ...	Moore Privy Council ...	England.
Moore ...	Moore ...	England.
Mor. ...	Morrell ...	England.
N. & M. ...	Neville & Manning ...	England.
N. & M. Ry. Cas.	Neville & Manning Railway Cases... ..	England.
N. & P. ...	Neville & Perry ...	England.
N. & S. ...	Nicholls & Stops ...	Tasmania.
N.S.W.R. ...	New South Wales Reports ...	New South Wales.
N.Z. Gaz. L.R. ...	New Zealand Gazette Law Reports ...	New Zealand.
N.Z.J.R.N.S. ...	New Zealand Jurist Reports New Series ...	New Zealand.
N.Z.J.R.N.S.S.C. ...	New Zealand Jurist Reports New Series Supreme Court ...	New Zealand.
N.Z. Jur. ...	New Zealand Jurist ...	New Zealand.
N.Z.L.R. ...	New Zealand Law Reports... ..	New Zealand.
N.Z.L.R.S.C. ...	New Zealand Law Reports Supreme Court ...	New Zealand.
New Sess. Cas. ...	New Sessions Cases ...	England.
Noy ...	Noy ...	England.
O.B. & F. ...	Ollivier, Bell & Fitzgerald ...	New Zealand.
P. ...	Law Reports Probate ...	England.
P. & D. ...	Perry & Davison ...	England.
P. Wms. ...	Peere Williams ...	England.
Q.B. ...	Queen's Bench (Adolphus & Ellis, New Series) ...	England.
[1891] Q.B. ...	Law Reports Queen's Bench, 1891 (onwards) ...	England.
Q.B.D. ...	Law Reports Queen's Bench Division ...	England.
Q.J.P.R. ...	Queensland Justice of the Peace Reports... ..	Queensland.
Q.L.J. ...	Queensland Law Journal ...	Queensland.
Q.L.J.N.C. ...	Queensland Law Journal, Notes of Cases... ..	Queensland.
Q.L.R. ...	Queensland Law Reports ...	Queensland.
Q.W.N. ...	Queensland Weekly Notes ...	Queensland.
R. ...	The Reports ...	England.
R.R. ...	Revised Reports ...	England.
Ray. (Ld.) ...	Lord Raymond ...	England.
Raym. (T.) ...	Sir Thomas Raymond ...	England.
Rep. ...	Coke ...	England.
Ro. or Rolle ...	Rolle ...	England.
Ro. Abr. ...	Rolle's Abridgment ...	England.
S.A.L.R. ...	South Australian Law Reports ...	South Australia.
S.C.R. ...	Supreme Court Reports ...	New South Wales.
S.C.R.N.S. ...	Supreme Court Reports New Series ...	New South Wales.
S.C.R. (Q.) ...	Supreme Court Reports, Queensland ...	Queensland.
S.M.H. ...	Sydney Morning Herald ...	New South Wales.

S.R.	...	State Reports...	...	...	...	New South Wales.
S.R. (Q.)	...	State Reports, Queensland	...	...	...	Queensland.
Salk.	...	Salkeld	...	...	...	England.
Sho.	...	Shower	...	...	...	England.
Sid.	...	Siderfin	...	...	...	England.
Sir T. Raym.	...	Sir Thomas Raymond	...	...	...	England.
Skin.	...	Skinner	...	...	...	England.
Smith	...	Smith	...	...	...	England.
Str. or Stra.	...	Strange	...	...	...	England.
Style	...	Style	...	...	...	England.
T.L.R.	...	Times Law Reports	...	...	...	England.
T.R.	...	Term Reports, Durnford & East	...	...	...	England.
T. & R.	...	Turner & Russell	...	...	...	England.
T. Raym.	...	Sir Thomas Raymond	...	...	...	England.
Tarl. or Tarl. T. R.	...	Tarleton Term Reports	...	...	...	New South Wales.
Tas. L. R.	...	Tasmanian Law Reports	...	...	...	Tasmania.
V.L.R.	...	Victorian Law Reports	...	...	...	Victoria.
V.L.R.C.L.	...	Victorian Law Reports Common Law	...	...	...	Victoria.
V.R. (L.)	...	Victoria Reports (Law)	...	...	...	Victoria.
Vern.	...	Vernon	...	...	...	England.
Vin. Abr.	...	Viner's Abridgment	...	...	...	England.
W.A.L.R.	...	West Australian Law Reports	...	...	...	West Australia.
W.Bl.	...	Sir William Blackstone	...	...	...	England.
W.N.	...	Weekly Notes	...	...	...	New South Wales.
W.R.	...	Weekly Reporter	...	...	...	England.
W. & W. C. L.	...	Wyatt & Webb Common Law	...	...	...	Victoria.
W.W. & A.C.L.	...	Wyatt, Webb & a'Beckett Common Law	...	...	...	Victoria.
W.W. & D.	...	Wilmore, Wollaston & Davison	...	...	...	England.
W.W. & H.	...	Wilmore, Wollaston & Hodges	...	...	...	England.
Wilk.	...	Wilkinson's Australian Magistrate	...	...	...	New South Wales.
Yelv.	...	Yelverton	...	...	...	England.

# PROHIBITION.

## PART I.

### THE WRIT OF PROHIBITION.

#### INTRODUCTION.

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## A.—DEFINITION.

“Prohibition is a writ issued to restrain an excess of jurisdiction (or sometimes a wrongful exercise of jurisdiction) on the part of an inferior Court acting in the assumed exercise of judicial functions.”—*Griffith*, C.J., in *R. v. Edwards*; *Ex parte Howells* (7 Q.L.J. 25).

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## B.—NATURE AND ORIGIN.

## i.—Grounds upon which the Writ is Granted.

“The Courts of Westminster Hall, having a general superintendency over all other Courts, will grant a prohibition to stay the proceedings of an inferior Court either *pro defectu jurisdictionis*, *pro defectu triationis*, or for proceeding as the law of the land does not warrant.”—Buller’s N.P. 218.

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“This writ of prohibition, it is *breve Regium et jus Coronae*, and if this writ shall be denied in such cases this would then be *in laesionem, exheredationem, et derogationem Coronae*; where any Court comes to be exorbitant in their proceeding we have *sacramentum* that lies upon us not to suffer any encroachments by any Court”: *Warner v. Suckerman* (3 Bulst. 119; 1 Ro. Rep. 252; 1 Ro. Abr. 381, 2; 2 Ro. Abr. 317, 8).

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“This Court hath power to prohibit . . . all . . . particular Courts which do hold plea by reason of their particular jurisdiction, or if they have a general jurisdiction by Act of Parliament, if they do exceed their authority they are by the common law to be prohibited by this Court . . . And this is so by the common law, that all particular Courts, either in respect of the place or of the causes to be there determined, if they do exceed their

authority, they are by the common law to be prohibited by this Court, being a particular Court erected for particular purposes": *Warner v. Suckerman* (3 Bulst. 119; 1 Ro. Rep. 252; 1 Ro. Abr. 381, 2; 2 Ro. Rep. Abr. 317, 8).

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"The superior Courts of Westminster not only grant prohibitions where inferior Courts assume a jurisdiction which properly belongs to such superior Court, but also in cases where one inferior Court encroaches upon another, and that even in matters in which such superior Courts have not a jurisdiction": *Bac. Abr. Prohibition* (I.).

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".... It seems to us advisable to draw attention again to the origin and reason of the writ of prohibition, and to the history of the procedures by which it has at different times been enforced: 'As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a great variety of Courts, hence it hath been the care of the Crown that these Courts keep within the limits and bounds of their several jurisdictions prescribed to them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed, which issues out of the Superior Courts of common law to restrain inferior Courts' (Bacon's Abridgement, Prohibition, quoting Rolle's Abridgement). 'The object of prohibition in general is the preservation of the right of the King's Crown and Courts, and the ease and quiet of the subject' (*ibid.*). 'The King may sue for a prohibition, though the plea in the Spiritual Court be between two common persons, because the writ is in derogation of his Crown and dignity' (*ibid.* C.). 'It is *contra coronam et dignitatem regiam* for any to usurp to deal in that which they have not lawful warrant from the Crown to deal in, or to take from the temporal jurisdiction

that which belongs to it. The prohibitions do not import that the ecclesiastical Courts are *aliud* than the King's or not the King's Courts, but do import that the cause is drawn into *aliud examen* than it ought to be, and therefore it is always said in the prohibitions (be the Court temporal or ecclesiastical, to which it is awarded), if they deal in any case of which they have not power to hold plea, that the cause is drawn *ad aliud examen* than it ought to be, and therefore *contra coronam et dignitatem regiam*' (2nd Answer in *Articuli Cleri*, 2nd Inst. 602). 'None may pursue in the Ecclesiastical Court for that which the King's Court ought to hold plea of, but upon information thereof given to the King's Court, either by the plaintiff or by any mere stranger, they are to be prohibited, because they deal in that which appertaineth not to their jurisdiction' (*ibid.*, 10th Answer). And in the judgment of Willes, J., in *Cox v. Mayor of London* (L.R. 2 H.L. 239, at 254), which seemed to exhaust all learning and ingenuity upon the questions of prohibition, this point is thus treated: 'All lawful jurisdiction is derived from and must be traced to the royal authority. Any exercise, however fitting it may appear, of jurisdiction not so authorised, is an usurpation of the prerogative and a resort to force unwarranted by law. Upon both grounds, viz., the infringement of the prerogative and the unauthorised proceeding against the individual, 'prohibitions by law are to be granted at any time to restrain a Court to intermeddle with or execute anything which by law they ought not to hold plea of. And they are much mistaken that maintain the contrary.' These authorities show that the ground of decision, in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed. If this were not so, it seems difficult to



understand why a stranger may interfere at all. If this be so, on what principle can there be any distinction in the action of the superior Court dependent upon the means by which, or the persons by whom it is informed of the breach of order, which is a breach of the prerogative? If it is the absolute duty of the superior Court to enforce order on being convinced of a breach of it by information given by the defendant in the suit below, why should it be a less absolute duty if it is convinced of the same breach of order by information given by a stranger? Order is no less broken, the prerogative is no less invaded! And if the smallness of the matter in dispute is to be a ground for non-interference, still more if delay in application for the writ of prohibition is to be a ground, they would seem to be stronger grounds if the defendant is to be treated as the party whose interest is to be protected, than if the interference is to be based only on the necessity of preserving administrative regularity or order. Assume that the defendant in the suit is in the wrong, there may be no damage in fact to him by the declaration of his liability being made by one Court rather than by another. It is true that there may be, as by his being cited to a distance, or into a Court of more expensive procedure. But these difficulties may exist, although the Court has jurisdiction. It follows from this view, also, that the real ground of the interference by prohibition is not that the defendant below is individually damaged, but that the cause is drawn *in aliud examen*, that public order in administration of law is broken. And inasmuch as the duty of enforcing such order is imposed on the superior Courts, and the issue of a writ of prohibition is the means given to them by law of enforcing such order, it seems to us that, upon principle and in the absence of enactment, it must be their duty to issue such writ whenever they are clearly convinced by legal evidence, by whomsoever brought before them, that an inferior Court is acting without jurisdiction or is ex-

ceeding its jurisdiction. And thus in the third answer in the case of the '*Articuli Cleri*' the duty is declared in absolute terms applicable to all cases: 'Prohibitions by law *are to be* granted at any time to restrain a Court to intermeddle with or execute anything which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary.' And in *Wadsworth v. Queen of Spain* (17 Q.B. 171): 'Therefore this Court, vested with the power of preventing all inferior Courts from exceeding their jurisdiction to the prejudice of the Queen or her subjects, *is bound* to interfere when duly informed of such an excess of jurisdiction.'—*Brett, J.*—delivering the judgment of *Brett, Grove, Denman* and *Keating, JJ.*, in *Worthington v. Jeffries* (L.R. 10 C.P. 379).

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"It undoubtedly belongs to the King's temporal Courts to restrain Courts of peculiar jurisdiction from exceeding the bounds prescribed to them; and by far the greater part of the instances in our books, in which prohibitions have issued, are cases of plain excess of jurisdiction. But some of the instances go beyond an excess of jurisdiction, and seem rather to fall under the head of wrong and injustice done to the party by refusing him, in the course of a proceeding strictly within the jurisdiction, some benefit or advantage to which the common or statute law entitled him, by which the general proceedings of those Courts are regulated."—*Eyre, C.J.*, in *Home v. Camden* (2 H. Bl. at 536).

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(a) Excess of Jurisdiction.—See Part I., Chapter I., p. 34.

(b) Prohibition in Aid.—See Part I., Chapter II., p. 202.

(c) Abuse of Natural Justice.—See Part I., Chapter III., p. 204.

- (d) To restrain Spiritual Court from holding trial in a manner contrary to the law of the land.—See Part I., Chapter IV., p. 250.
- (e) Misconstruction of Statute.—See Part I., Chapter V., p. 252.
- (f) To restrain a public nuisance or the committing of waste.—See Part I., Chapter VI., p. 266.

## ii.—Prohibition the apt Procedure to Test the Jurisdiction of Inferior Courts.

Where there is no jurisdiction prohibition is the proper and only remedy : *Dunstan v. Hill* (Tarl. 181).

A question of jurisdiction or no jurisdiction can only be entertained by motion for prohibition or mandamus : *Jones v. McEvoy* (8 S.C.R. 15).

### *Illustrations.*

Where a magistrate exceeds his jurisdiction, prohibition, and not case stated, is the appropriate remedy : *Re Dunstan v. Hill* (Tarl. 181).

Prohibition is the proper remedy where an inferior Court entertains a suit against a foreign sovereign in his representative capacity : *Wadsworth v. Queen of Spain* ; *De Haber v. Queen of Portugal* (17 Q.B. 171).

It was held by *Hanson, C.J., Gwynne and Wearing, JJ.*, that where there is no original jurisdiction in a local Court, there can be no appellate jurisdiction in the superior Court, the remedy being prohibition : *Blyth v. Warhurst* (7 S.A.L.R. 134). Cf. *Paterson's, &c., v. Harvey* (12 N.Z. Gaz. L.R. 39).

Land held under perpetual lease under sec. 136 of the Land Act, 1885, is not "Crown lands" within the meaning of the definition in sec. 4 the Mining Act 1891, and is therefore not liable to be taken up for mining purposes, though within a mining district, unless it has been first resumed by Proclamation. A warden was proceeding to deal with an application for a special claim over land comprised in such a lease ; on application for a prohibition, the objection was raised that this was matter for appeal, and not for prohibition. *Pennefather, J.* (whose

decision was affirmed on appeal by *Prendergast*, C.J., *Denniston* and *Conolly*, J.J.), held that prohibition was the proper remedy. His Honour said: "The first question which has been argued is whether this is a case for prohibition or for appeal. It has been urged that the point has already been decided by Mr. Justice *Conolly* in *Falvey v. Tregoweth* (16 N.Z.L.R. 341). . . . In *Falvey v. Tregoweth*, certain land was undoubtedly within the cognisance of the Warden's Court. The question was whether a license for a special claim should be granted to A., who then made the application, or to B., who had made a previous application, which might or might not have lapsed. That was a matter for the warden to decide. If he decided wrongly, the aggrieved party had his remedy by appealing to the District Court. But here the question is whether certain land is within the cognisance of the Warden's Court at all. The warden is about to deal with it as being so; if it is not, he has exceeded his jurisdiction, and the proper course for the injured party is to obtain an order from the Supreme Court prohibiting him.—See *Winiata te Wharo v. Airini Tonore* (14 N.Z.L.R. 209)": *McKenzie v. Couston* (17 N.Z.L.R. 228).

*Denniston*, J.—"The plaintiff alleges an agreement by the defendant to sell his interest in the land and a refusal to carry out such an agreement, and asks damages for breach of contract. The defendant denies that he made the agreement and admits his refusal to perform it. The plaintiff never made any objection to the defendant's title, nor did the defendant base his refusal on any want of title. If A. sues B. for damages for refusing to complete an agreement for the sale of a horse, and B.'s answer is that he never refused to sell the horse, in what sense is the title to the horse in dispute? The issue between the parties could be and ought to be decided without raising any question of title. It is not, therefore, necessary to decide whether this is an objection that can be taken on appeal. Notwithstanding the *dicta* in *Barker v. Palmer* (8 Q.B.D. 9), I see considerable difficulty in holding that an objection to the jurisdiction of the Court can be taken by appeal, which is a step in the case and assumes the Court to be seised of the case. *Barker v. Palmer*, though decided in 1881, does not seem to be cited in any of the text books as an authority for the proposition relied on": *Gornmley v. McIntyre* (12 N.Z.L.R. 36).

A resident magistrate of Wellington had given a verdict of 20s. for the plaintiff in an action for breach of contract. The subject matter of the contract was a carriage, which the plaintiff had bought for £130. Two objections were taken on special case on appeal from the magistrate (1) that the cause of action arose wholly within the Dunedin district; (2) that the amount involved took the case out of the jurisdiction of the

resident magistrate, which is limited to £50. *Prendergast*, C.J., held that neither ground was one for appeal, but for prohibition. "I think appeal lies only where the Judge has power to finally decide, subject to appeal." His Honour continued: "The second ground, as I understand, is this: that in an action for damages for non-delivery of goods of the value of over £50, the Court having jurisdiction limited to £50, has not jurisdiction, though the damage claimed is less than £50; for it is urged that if it has jurisdiction to entertain the suit for damages for the non-delivery, the judgment in that suit could be pleaded as an estoppel in a cross suit to recover the price in another Court with a more extended jurisdiction. In the judgment of Mr. Justice *Chapman* in the Court below, in the case of the *Otago Investment Co. v. Burns*, cited in the same case on appeal (1 N.Z. Jur. 165; 2 C.A. 551), a case decided in the Supreme Court of Victoria is mentioned and approved of. The case is *Brown v. White* (2 A.J.R. 119; 2 V.R. (L.) 209) which was an action in the County Court to recover damages for breach of contract for the sale of 4500 sheep, and that contract was for more than £250, the limit of jurisdiction of the County Court in Victoria. The damages claimed for short delivery were only £75, but the County Court Judge nonsuited the plaintiff, on the ground that he had no jurisdiction in the action on the contract. That decision was upheld on appeal in Victoria. In the judgment of the Court of Appeal in the *Investment Co. v. Burns* (*ubi sup.*) the case of *Brown v. White* (*ubi sup.*) is not referred to. All the Court seemed to decide in that case was, that if there was jurisdiction in the Resident Magistrate's Court in the particular case, the decision was no estoppel in the Supreme Court, and of course if there was not jurisdiction there could not be an estoppel. It is to be regretted that the case of *Flitters v. Alfrey* (44 L.J.C.P. 73) was not cited in the argument of that case, as the decision in the Court of Appeal seems opposed to that in the case mentioned. The Court of Common Pleas decided that the proceedings in the County Court were conclusive, though not an estoppel. However, as it seems to me, the judgment of the Court of Appeal in the *Investment Co. v. Burns* (*ubi. sup.*) does not apply to the present case. As above pointed out, the question being one of jurisdiction is not one to be raised on appeal, but by proceedings for a prohibition; but I am disposed to think that the Resident Magistrate had jurisdiction, and I am not disposed to adopt the decision in *Brown v. White* (*ubi sup.*). It seems to me that the language of our Act gives the magistrate jurisdiction where the damages claimed for breach of contract are within the pecuniary limits of jurisdiction. In *Brown v. White* (*ubi sup.*) the question of jurisdiction was treated as a nonsuit point, and the Court above entertained the appeal. The objection,



however, that prohibition was the proper proceeding was not made in that case": *Groves v. Somerville* (2 N.Z.J.R.N.S. S.C. 1).

On appeal from a stipendiary magistrate, *Stout*, C.J., said:—"Whether there can be an appeal on the question of jurisdiction was not raised by the respondent, but, on the contrary, waived—a *dictum* in *Barker v. Palmer* (8 Q.B.D. 9), approved of in *Sweetland v. The Turkish Cigarette Co.* (47 W.R. 511), showing that it may be. In *Groves v. Somerville* (2 N.Z. Jur. N.S.S.C. 1) the contrary was decided, and a doubt as to the *dictum* in *Barker v. Palmer* was expressed in *Gormley v. McIntyre* (12 N.Z.L.R. 36). It is not necessary in this case to give any decision on that point": *Kilminster v. Monaghan* (21 N.Z.L.R. 522).

*Held*, by *Gwynne* and *Wearing*, JJ., that where an inferior Court makes an order without jurisdiction, no appeal lies therefrom, prohibition being the proper remedy: *Watts v. Giesecke* (4 S.A.L.R. 123).

A special case was stated by the Land Appeal Court, the question asked being whether that Court had jurisdiction to entertain a certain appeal from a Local Land Board. The case was struck out with costs. "The Land Appeal Court had jurisdiction or it had not. If they had jurisdiction and declined it, then a *mandamus* would lie. If they had no jurisdiction to make this order, then a prohibition would lie. We are asked to decide whether the Land Court had jurisdiction or not, and that is not a matter that we can determine on appeal."—*Darley*, C.J.: *In re Rowley* (25 W.N. 180; 8 S.R. 622).

By order VIII., rule 7, County Court Rules, 1875, "The summons in an action brought to recover lands shall be delivered to the bailiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof." The plaintiff in an action delivered the summons to the bailiff 39 clear days, and the bailiff served it upon the defendant 38 clear days, before the return day. At the hearing, the County Court Judge ruled that the service was good, and, after hearing, found for the plaintiff. It was *held*, on appeal, that the provision in Order VIII., r. 7, was obligatory, and not merely directory, and therefore that the Judge ought not to have tried the case. And objection being made that the proper remedy was prohibition and not appeal, *held*, that the proper remedy was by appeal and not to apply for a prohibition against the issue of execution on the judgment. *Grove*, J.: ". . . I do not think it necessarily follows that an appeal will not lie because there is a remedy by prohibition. There is a passage in Comyn's Digest (Prohibition, book 7, D., p. 140) which, though perhaps it does not apply to every case, tends to show that there may be an appeal even though prohibition will lie, and it would also



appear, from the same authority, that the appeal takes precedence of the remedy by prohibition. . . . Therefore, assuming prohibition will lie, I see nothing here to take away the right of appeal." *Lopes, J.* : ". . . . The whole question being one of procedure, it appears to me that the Judge's ruling was upon a matter of law incident to his jurisdiction, and that an appeal can therefore be brought": *Barker v. Palmer* (8 Q.B.D. 9).

On 9th December, an order was made by a County Court Judge giving judgment for defendants with costs. On 22nd December, upon the application of the plaintiff, he reviewed his decision and made an order for no costs. Defendants appealed. *Darling, J.*, said: "I also think that the statement in *Barker v. Palmer* (45 L.T. 480; 8 Q.B.D. 9) shows that it is open to the defendants to bring this before us by appeal as well as by prohibition to review the order that has been made": *Sweetland v. The Turkish Cigarette Co.* (80 L.T. 472).

"Where a prohibition lies to an inferior Court, no doubt an appeal will also lie; but the converse does not hold good."—*Alderson, B.*, in *Ex parte Story* (8 Ex., at 202).

If costs are awarded by a District Court Judge without jurisdiction, there is a remedy by way of appeal on case stated as well as by way of prohibition. *Butler v. James* (25 N.Z.L.R. 382) followed: *Miller v. Kennedy* (11 N.Z. Gaz. L.R. 200).

An objection to the jurisdiction of the Land Appeal Court may be taken by appeal. *In re Wilmott* (26 W.N. 139).

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### iii.—Whether Writ Discretionary or of Right.

See Part I., Chapter VIII., p. 279.

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### iv.—Whether of Right or of Course.

"On consideration, moreover, it will be seen that the argument is based on the fallacy that the term 'as of right' is synonymous with 'as of course,' so that an appeal could not be said to lie as of right unless it lay as of course. But the words 'as of right' and 'as of course' are not synonymous. For instance, a writ of prohibition is said to be a writ of right, but not of course—*Mayor of London v. Cox* (L.R. 2 H.L. at 283)."—*Griffith, C.J.*, in *Parkin v. James* (2 C.L.R. 315; 11 A.L.R. 142).

“ The common law prohibition is one of those extraordinary remedies which, although one of right, is not one granted of course, the Court having a discretion as to whether or not it will grant it. I do not mean to say that the Court has a discretion to do what it pleases and to refuse the order or not, as it pleases, without reason ; it gives the Court jurisdiction to say whether under the circumstances the interests of justice will be served by the issue or refusal of the writ.”—*Hodges, J., in Mayor of Bendigo v. Craven ; Ex parte Victorian Railway Commissioner* (24 V.L.R. 173).

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*Martin, B. :* “ The writ is of right, but not of course. Its true nature and character were pointed out by *Mansfield, C.J.,* in the case of *Buggin v. Bennett* (4 Burr. 2035), namely, that where a party has established the facts upon which he founds his application to the satisfaction of the Court, he is entitled to the writ as of right. In this respect, it resembles a *mandamus* and *quo warranto*.” *Alderson, B. :* “ It appears from *Wilmot’s Notes*, at page 82, that ‘ a writ which issues upon a probable cause, verified by affidavit, is as much a writ of right as one which issues of course.’ In my opinion, that position contains as much good law as it does good sense ” : *Jackson v. Beaumont* (11 Ex. 300).

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“ The writ, however, though it may be of right, in the sense that upon an application being made in proper time, upon sufficient materials, by a party who has not by misconduct or laches, lost his right, its grant or refusal is not in the mere discretion of the Court, is not a writ of course, like a writ of summons in an ordinary action, but is the subject of a special application to the Court upon affidavit.” —*Per Willes, J., in Mayor, &c., of London v. Cox* (L.R. 2 E. & I. at 278, 279).

**v.—Kinds of Prohibition.**

Prohibition may be—

- a. Absolute—in which case the inferior Court is absolutely prohibited from proceeding in a matter there pending.
- b. Quoad—in which case the inferior Court is prohibited so far as concerns some part of the matter there pending.
- c. Quousque—in which case the inferior Court is prohibited from proceeding in a matter there pending until certain requirements have been complied with.

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(a) PROHIBITION ABSOLUTE.

Here the writ is granted to restrain the proceedings in the inferior Court without limitation as to the matter or the time in regard to which the writ is to operate.

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(b) PROHIBITION QUOAD.

“If a suit be in a spiritual Court for a matter within their cognizance, mixed with matter of which the Court has no jurisdiction, a prohibition shall go *quoad* the part of which it has no jurisdiction.”—Comyn’s Digest, tit. Prohibition, F. 17.

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“A prohibition may be granted in respect to part, though not for the whole.”—*Johnston, J., in Wilson v. Stratford* (N.Z. L.R. 3 S.C. 329).

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“If there are before the Court several matters, some within and some without its jurisdiction, it is clear that a prohibition may go as to those matters which are beyond its jurisdiction, if the Court assumes to deal with them. That is called prohibition *quoad*.”—*Griffith, C.J., in The Colliery Employees’ Association, &c. v. Brown* (3 C.L.R. at 264).

“ That where an inferior Court acts within its jurisdiction as to part, but exceeds as to part, a prohibition, *though moved for as to the whole*, may issue as to the part in excess, seems to have been early decided : see Comyn’s Digest, Prohibition (F. 17), and *Lush v. Webb* (1 Sid. 251) and Buller’s Nisi Prius, p. 218 (b).”—*Brett, L.J.*, in *South Eastern Railway Co. v. Railway Commissioners* (6 Q.B.D. at 605).

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“ . . . they (*i.e.*, the Divisional Court) refused to make the rule for the writ of prohibition absolute, upon the ground that it had asked for too much, even if there were good grounds with regard to two of the complaints. Now, as the decision has been given upon that ground, I cannot agree with it. It seems to me that where a party asks for a prohibition, and he asks the Court to prohibit another Court more than he ought to ask for, yet, nevertheless, if part of his request turns out to be well founded, the Court ought to mould the prohibition and to limit it to only so much of his request as is well founded . . . .”—*Brett, L.J.*, in *R. v. Local Government Board* (10 Q.B.D. at 319, 320).

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“ . . . . In the latter case he may or may not have exceeded his jurisdiction, but has not contravened the Church Discipline Act. It was argued that at least it was doubtful whether he was not doing both, and it was argued that as the first was in excess of jurisdiction, a prohibition should go against all, whether the rest was within his jurisdiction or not. But common sense and the course of precedents are alike against this contention. Where part is within the jurisdiction and part not, a prohibition is awarded against doing what is in excess of jurisdiction and a consultation as to the rest. For this it is enough to cite *Townsend v. Thorpe* (2 Ld. Ray. 1507); *Middleton v.*

*Crofts* (2 Atk. 650) ; and *Free v. Burgoyne* (5 B. & C. 400). It was argued that your Lordships ought to act in conformity with the principle of the decision of *Reg. v. O'Connell* (11 Cl. & F. 155), and some countenance is given to that argument by Lord Justice *Cotton*, where he says it is impossible to divide the order or apportion the sentence. I do not think that principle is applicable to prohibition."—Lord *Blackburn* in *Mackonochie v. Lord Penzance* (6 A.C. at 445).

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"So if after a prohibition granted it appears that the spiritual Court has cognizance for a part, a consultation shall go *quoad*, &c. : 12 Co. 44."—Comyn's Digest, Prohibition K. (1).

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"If a suit be in the spiritual Court for a thing spiritual mixed with a matter triable by the common law, a prohibition shall be granted *quoad* the matter triable at the common law and not for the whole *if they may be severed* : Mich. 14, B.R. *Fish and Chamberlaine* resolved. *Contra*, M. 8 Ja. B. *per curiam* : *Jenor's Case*."—Viner's Abridgement, Prohibition E (a).

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"I am, therefore, of opinion that that part of the order is bad (*i.e.*, the part ordering costs to be taxed). But, in my opinion, I am not bound for that reason to prohibit the enforcing of the order. I can prohibit that part which relates to costs, that part being severable. In the case of *Kerkin v. Kerkin* (3 E. & B. 399), the Court decided that the plaintiff was right as to the leasehold, but wrong as to the freehold, and the Court gave the writ as to the leasehold, but refused it as to the freehold. I can therefore prohibit part of the order appealed from without prohibiting the whole order."—*Hodges, J., South Loch Fyne G. M. Co. v. Coates*, 26 V.L.R. 117 ; 6 A.L.R. 125.)



“ With respect to the question whether a partial prohibition can be granted, I have not the slightest doubt that it can be. If an inferior tribunal is about to enter upon an inquiry as to matters some of which are within its jurisdiction and some of which are without its jurisdiction, this Court will grant a prohibition to prevent it entering upon an inquiry as to those matters which are without its jurisdiction.”—*Stephen, J., in Ex parte Smith* (15 W.N. 12).

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*Illustrations.*

A magistrate on an inquiry as to an election petition under the Regulation of Local Elections Act 1876, gave judgment declaring the election void, with costs against the returning officer. The magistrate had no power to order the returning officer to pay costs. *Johnston, J.*, granted a prohibition as to part of the order—that against the returning officer for payment of costs : *Wilson v. Stratford* (N.Z.L.R. 3 S.C. 329).

A distress warrant had been issued on a judgment for £7 1s. 1d. His Honour deducted the amount of the costs of the distress warrant (5s.) and the excessive amount of costs (£1 1s.) and granted a prohibition “ restraining the defendants from proceeding on any part of the judgment in excess of the sum of £5 15s. 1d. ” : *Duthie v. McGibbon* (10 N.Z.L.R. 514).

Where a Judge allowed expenses for several witnesses, some of which allowances he was, and others he was not, empowered to make, a prohibition was granted in respect of so much of the order as directed payment of the latter allowances : *Hay v. Jackson* (6 N.Z.L.R. 725.)

A District Court Judge gave judgment for the claimant in an interpleader issue for the proceeds of sale of certain goods, the amount being under £10. The Judge granted costs to the successful party and directed the costs to be taxed on the scale prescribed for claims between £10 and £30. A prohibition was granted as to so much of the order as ordered costs on the scale between £10 and £30. “ No scale is fixed for cases under £10, and the Judge had no power to direct the costs to be taxed on any scale ” : *Keogh v. Blake* (6 Q.L.J. 213).

A dispute had arisen between certain employees and the applicant company, and this dispute was taken up by a union, and a claim filed as to the conditions of employment of men engaged in twelve different classes of work. As to nine of these classes there never was any dispute, but there was a dispute as to the remaining three classes. The Indus-



trial Arbitration Court proposed to deal with the claims filed as to all the classes ; but it was admitted that a prohibition must go in respect of the nine classes : *Ex parte Commonwealth Portland Cement Co.* (6 S.R. 720).

Justices had made an order for an amount comprising a claim for work and labour and " money paid." It was *held* that " money paid " is not within the jurisdiction of justices (sec. 41, Act No. 267). The Court directed the order of the magistrates to be reduced, so as to disallow the amount ordered for " money paid," and ordered the complainant below to pay the costs of the rule *nisi* : *Regina v. Williams* (5 W.W. & A.C.L. 5) [But see now Justices Act 1890 (No. 1105) sec. 59 (+).]

Prohibition *quoad* the admitting of improper evidence : *Breedon v. Gill* (5 Mod. 271). And see Bacon's Abr., Prohibition I.

A solicitor stated in a Warden's Court that he appeared for all the defendants and judgment was given against all the defendants, it afterwards appeared that two of the defendants had no interest in the property in question, and had not authorised the solicitor to act for them. *Held*, that the matter was not one for prohibition, but that, even if it were, it should not extend further than to prohibit the enforcement of the judgment against the two defendants who had not authorised the solicitor to appear : *Ah Fook v. Young* (8 N.Z.L.R. 370).

If a libel contained matter outside the jurisdiction, a prohibition absolute might be awarded and afterwards a consultation as to the part within the jurisdiction : *Fuller's Case* (12 Rep. 41).

The Industrial Arbitration Court made an award directing preference to Unionists, and further directing that members of the employers' union requiring labour should notify the secretary of the employees' union. Prohibition granted to restrain the Court from proceeding on so much of the order as directed notice : *Trolly, Draymen & Carters' Union v. Master Carriers' Association* (2 C.L.R. 509 ; 5 S.R. 77).

Suggestion is *modus* for a farm, and the libel is for tithes and offerings, the suggestion not extending to offerings. The rule, therefore, was only *quoad* : *Lush v. Webb* (1 Sid. 251 ; 2 Keb. 27).

Where the Supreme Court of New South Wales granted a prohibition absolute which should have been *quoad* only, and, on application for leave to appeal, this was not made a ground, the High Court amended the order by limiting it to the part of the order of the inferior Court which was made without jurisdiction : *Colliery Employees' Federation v. Brown* (3 C.L.R. 255).

In *R. v. Pike* (2 Keb. 779, pl. 6) a prohibition was denied where the master and mariners joined in a suit in the Admiralty for their wages. But *Holt, C.J.*, said that a prohibition ought to have been granted *quoad*

in the said case. Mariners may sue in that Court for wages *quod communis error facit jus*, but the right is not extended to the master : *Clay v. Snelgrave* (1 *Ld. Ray.* 576).

A clerk was sued in the spiritual Court to deprive him of office and punish him. The Court granted a prohibition as to all but the proceeding for deprivation—as to the rest, the matters were triable only by the common law : *Townshend v. Thorpe* (2 *Ld. Ray.* 1507).

Where a parson libelled in the spiritual Court for slander of him, alleging some words that were triable in that Court and others that were not, a prohibition was granted as to the latter words, but denied as to the others : *Osborn v. Poole* (1 *Ld. Ray.* 236).

Plaintiff sued in a County Court for specific performance and for damages ; the Court had no jurisdiction to grant specific performance. The Court granted prohibition as to the claim for specific performance, but allowed the action to proceed as to the claim for damages : *R. v. Westmoreland* (58 *L.T.* 417).

Prohibition was sought against the commissioners exercising jurisdiction at all in a matter before them, but it was *held* that they had jurisdiction as to some of the matters. *Brett, L.J.*, thought the prohibition should be *quoad*, but *Selborne, L.C.* : “ I do not think it would tend to the more convenient administration of justice in this case if this Court were to endeavour in the order to be now made (on the demurrer) to draw a line between the good, the bad, and the ambiguous parts of that judgment. It appears to me to be technically not wrong, and practically to be most convenient, to allow the demurrer generally, without prejudice to any new application for the prohibition, if the commissioners should make any order or issue any writ not authorised by the statute.” *Coleridge, C.J.*, agreed with *Selborne, L.C.* : *South Eastern Railway Co. v. Railway Commissioners* (6 *Q.B.D.* at 598).

Proceedings were taken in an ecclesiastical Court against a clergyman, with two objects—(1) *pro salute animae*, and (2) deprivation. As to the first, the proceedings were by statute out of time, and the King’s Bench granted a prohibition *quoad* proceeding *pro salute animae*, but allowed a consultation as to the rest. The House of Lords *held* that the Court of King’s Bench was “ warranted in so severing the judgment, not merely upon principle, but on reference to the cases which were quoted. See *e.g.*, *Townsend v. Thorpe* (2 *Ld. Ray.* 1507) ” : *Free v. Burgoyne* (2 *Bligh N.S.* at 79 ; 5 *B. & C.* 400).

Prohibition granted as to the whole where the part within the jurisdiction was not severable : *Evans v. Gwyn* (5 *Q.B.* 844).

Suit for a rate assessed by churchwardens by custom for the repair

of the church, as well the chancel as the nave of the church. It was resolved, on motior for a prohibition, that parishioners, and not churchwardens, should assess the rate, and that the parison ought to repair the chancel, and not the parishioners, but that the parishioners ought to repair the nave of the church; thereupon, *Showers* asked that the prohibition should be *quoad* the suit for the rate for the chancel. But *resolved*, that the prohibition shall be for the whole, because it is but one rate and entire; but if a man libel for two distinct things, the one of which is of ecclesiastical cognisance and the other not, a prohibition shall be granted *quoad* that which is of temporal cognisance, and they of the Court Christian shall proceed for the other: *Pense v. Prouse* (1 Ld. Ray. 59).

Railway Commissioners fixed a through traffic rate for goods on several canals owned by different companies: the effect of the order was to reduce the charges made by one company below their statutory rights. As the order was made without jurisdiction, a prohibition was granted, "and as the through rate they have sanctioned is an entire matter and was so dealt with by them, we cannot strike out so much as relates to the Birmingham Canal Co. and leave the rest remaining. The order, therefore, being bad in part is bad in its entirety, and this rule must be made absolute."—*Pollock, B., in Warwick Canal Co. v. Birmingham Canal Co.* (5 Ex. D. at 12, 13).

Plaintiff sued defendant in a Local Court for £40 13s. 7d., the defendant counterclaiming for £52 7s. 3d. The matter was by consent referred to an arbitrator who, in his award, stated that, as both claim and counterclaim were interwoven, he ignored the credits in both cases and found for the plaintiff for £125 8s. 9d., with costs, and for the defendant on the counterclaim for £112 with costs. The defendant then applied for a prohibition against the magistrate and the arbitrator on the ground of excess of jurisdiction, and the Judge in Chambers granted the prohibition, but limited it to the difference between the two judgments. On appeal, it was *held* that the Judge had no power to so limit the prohibition. "It is clear from the case I have just referred to (*Farquharson v. Morgan* ([1894] 1 Q.B. 552), that in that action there was ample room for a limited prohibition, because the award distinctly found in favour of some matters within the jurisdiction of the County Court, although some of the other matters were outside that jurisdiction. Here, however, it is impossible to dis sever these judgments and say what part was within the jurisdiction of our local Court and what outside the jurisdiction."—*Stone, C.J. : Pennefather, J.* took the same view: *Ralla Singh v. Bischen Singh* (3 W.A.L.R. 26).

A magistrate allowed a nonsuit, and ordered plaintiff to pay certain

costs, including those of witnesses not summoned. On application for a prohibition, it was objected that it was not shown how much was apportioned to particular witnesses, and that if the magistrate had power to give any costs it must be assumed he was acting within his jurisdiction. Applicant cited *Free v. Burgoyne* (5 B. & C. 400), and urged that the prohibition should go to prohibit the excess. *Williams, J.*: "Certainly there may be prohibition as to part; if an excess of jurisdiction is shown as to part of this sum it is for you (applicant) to show how much is within": *R. v. Robinson* (O.B. & F.S.C. 88).

*Cohen, J.* (diss.), thought that the magistrate as to part of his judgment acted without jurisdiction. "Whether the writ should go as to a part or as to the whole it is not necessary now to determine, because in view of the decision of their Honours, *Owen* and *G. B. Simpson, JJ.*, the judgment of the Court will be that the writ is not to go. I may say, however, that in my opinion the writ should go as to the whole. There is a clear distinction between a prohibition going as to part before the matter has been adjudicated upon, and when the matter has been decided and there is a judgment, in which case the judgment is indivisible and the prohibition must go to the whole judgment": *Ex parte Fealey* (18 N.S.W.L.R. 282; 14 W.N. 19); Cf. *Blackburn, J.*, in *Maekonochie v. Penzance* (6 A.C. 424); *Ex parte Mulholland* (11 S.C.R. 310).

"It is also said to be doubtful whether the Arbitration Court asserted jurisdiction to deal with matters affecting the future, or merely said that they would go on with the hearing of the claim and dismiss it if they thought they had no jurisdiction to deal with the matters brought before them. If there are before the Court several matters, some within and some without its jurisdiction, it is clear that a prohibition may go as to those matters which are beyond its jurisdiction if the Court assumes to deal with them. That is called prohibition *quoad*. It is also, no doubt, a general rule that, on an application of that sort under such circumstances, the superior Court will not assume that the inferior Court intends to exceed its jurisdiction. It will say then that the application is made too soon, and that the applicant must wait and see whether the inferior Court really intends to exceed its jurisdiction."—*Griffith, C.J.*, in *The Colliery Employees, &c. v. Brown* (3 C.L.R. at 264).

"The case of *Hallack v. Cambridge* (1 Q.B. 593) is an authority for saying that where proceedings are pending before the inferior Court, having reference to several distinct things, one or more of which is within the cognizance or competence of the Court and others are not this Court ought not to assume that the inferior Court will go beyond its competency and jurisdiction; and therefore we ought not to interfere

at the present stage of the proceedings. A prohibition may most certainly be applied for as well after as before the granting of the faculty, and if the Ecclesiastical Court should proceed to pronounce judgment, granting the faculty for all the purposes for which it is sought, there is nothing to prevent a fresh application being made to this Court after such sentence is pronounced.”—*Cockburn, C.J.*, in *The Queen v. Twiss* (L.R. 4 Q.B. at 413).

A faculty was prayed for certain objects for one of which a faculty could legally be granted, but for the other not. *Held*, that a prohibition against the faculty sought before the faculty was granted was prematurely applied for : *Hallack v. Cambridge University* (1 Q.B. 593).

It is no objection to a rule for prohibition before verdict that part of the cause of action arose within the jurisdiction : *Wallace v. Allan* (44 L.J.C.P. 351).

Where the plaintiff sued in the County Court to recover two parcels of land, and the Court had jurisdiction to try the action as to one parcel but not as to the other, a prohibition was granted *before hearing* to restrain proceedings as to the parcel of land as to which there was no jurisdiction : *Kerkin v. Kerkin* (3 E. & B. 399).

Where a plaint in the County Court was for two breaches of the same contract, and the County Court had jurisdiction as to one breach, but not as to the other, a prohibition applied for before the hearing was granted as to the latter breach, the plaintiff to be at liberty to proceed on the former, subject to his applying to the County Court Judge to amend the plaint so as to confine it to the cause of action as to which there was jurisdiction : *Walsh v. Ionides* (1 E. & B. 383).

Plaintiff, in Small Debts Court, sued defendant for £4 0s. 10d., balance of account ; defendant applied for a prohibition on the ground that some of the items in the particulars were “ fees of office ” (10 Vic. No. 10, sec. 4—now 1899 No. 13, sec. 11). But a prohibition applied for before the hearing of the action was refused—“ Even if the Court of Petty Sessions had no jurisdiction as to these amounts (*i.e.*, the fees of office), still, that Court having jurisdiction to entertain the other portion of the claim, this Court will not grant a prohibition ” : *Evans v. Wedderburn* (15 N.S.W.R. 482).

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(c) PROHIBITION QUOUSQUE

“ Prohibitions are granted either absolutely or *hoc usque* only till such an act be done. The first of these is



peremptory, and ties up the inferior jurisdiction till a consultation is awarded ; the second is *ipso facto* discharged upon performing the act, and that without any writ of consultation . . . . .

It was formerly held by all the Judges of England that when there was a proceeding *ex officio* in the Ecclesiastical Court, they were not bound to give the party a copy of the articles. But the law is otherwise ; for in such cases, if they refuse to give a copy of the articles, a prohibition shall go *quousque* they deliver it " : Bacon's Abridgement, Prohibition (F.).

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" So by the St. 2 H. 5, 3, and 2 (or 2 and 3) Ed. 6, 13, he that sues a prohibition must deliver to the Court a copy of the libel ; and, therefore, if the spiritual Court refuses a copy of the libel, a prohibition lies *quousque*, &c., after which the spiritual Court cannot proceed *till* a copy is granted : Mod. Ca. 308 ; Sal. 553 ; R. 4 Ed. 4, 37 b. ; Hard. 364. If a prohibition be granted before a libel exhibited, he may afterwards exhibit it, but do nothing more : *per Holt*, Mod. Ca. 308. So a prohibition shall be *quousque* for refusing a copy of the articles : R. 1 Vent. 5 ; Mod. Ca. 87 ; Hard. 364. . . . .

So, after a prohibition for refusing a copy of the libel, if a copy be granted, he may have another prohibition upon the merits : R. Mo. 917. But if a copy be granted, the first prohibition shall be discharged *ipso facto* without a writ of consultation : Mod. Ca. 308. And, therefore, there cannot be a prohibition for denying a copy of the libel and upon the merits together ; for if the prohibition for refusal of a copy be discharged, by the granting it, there may afterwards be a prohibition upon the merits : R. Mod. Ca. 308. So, if a prohibition for refusing a copy of a libel be absolute, it shall be discharged by a *supersedeas* : 1 Vent. 5. So, a prohibition for refusing a copy ought not to be granted



till an affidavit of the refusal: 1 Vent. 252.”—Comyn’s Digest, Prohibition, F. 15.

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*Illustrations.*

A. was sued in the Consistory Court by churchwardens for a rate made by them; he pleaded that the rate was invalid on the ground that at the vestry a poll was demanded and refused. The Consistory Court (and, on appeal, the Court of Arches) declined to entertain the plea, and, on application for a prohibition, the Court of Common Pleas (*Erle, C.J., Williams, Willes, and Byles, JJ.*), held that the plea was good under 59 Geo. III. c. 134, sec. 25, and 3 Geo. IV. c. 72, sec. 26. The matter had been argued upon declaration and plea, and *Willes, J.*, who delivered the judgment of the Court, said (at p. 410): “The second plea appears to have been pleaded with a view to raise the question whether, in case of judgment for the plaintiff, a peremptory prohibition should go or only a prohibition *quousque*, viz., until the Judge of the Court of Arches may alter his opinion upon the construction of the statute and admit the responsive allegation. Upon this point, no authority has been found nor any sound reason given for issuing the writ otherwise than in the general form *in cases where the erroneous decision goes to the merits*. The party seeking a prohibition upon the ground that the subordinate Court has refused as irrelevant a defence under a statute which is said to have been misconstrued, must, in order to establish the gravamen, show, not merely that the defence is valid in law, *but also that it is true in fact*. That course is in accordance with many precedents, and it has, we think, been correctly adopted in the present case. The defendants in prohibition have therefore the opportunity of trying in this proceeding the question whether the matter alleged in answer to the libel be true. If it be not established in proof, the judgment will be for a consultation. Until its truth is established, no peremptory prohibition will go. If its truth should be established, then it will appear to the Court judicially, and in a suit between the same parties, that any further proceeding in the subordinate Court would, or ought to be, fruitless. Thus, the prohibition, if in the event it shall go, ought to be peremptory. The case cited by Mr. *White*, in his able argument for the defendants—*Anonymous* (6 Mod. 308)—to show that the Court, if adverse, ought to grant the prohibition *quousque* only, seems, when properly considered, to be an authority to the contrary; for, the application was for a prohibition upon the ground, first, that a copy of the libel was refused, and secondly upon the merits, and that application was rejected

by Lord *Holt* and his companions as improperly asking inconsistent remedies—the prohibition for refusing a copy of the libel being conditional only and the prohibition upon the merits being peremptory—as we think the prohibition in this case, being upon the merits, ought, if and when issued, to be. The practice of issuing a prohibition *quousque* for denying a copy of the libel was traced through Fitzherbert's *Natura Brevium* 43 E., to the Year Book of Edward IV. (M. 4 E. 4, fo. 37a), where a special prohibition *quousque* appears to have been framed by this Court in order to enforce the statute of 2 H. 5 Stat. 1, c. 3, which entitled parties cited in the Court Christian to demand a copy of the libel. In such cases, when prohibition is asked by reason of a refusal to grant a copy of the libel, the difficulties present themselves that, in the absence of the libel, there can be no prohibition for defect or abuse of jurisdiction and that the subordinate Court has not yet given any decision upon the merits. These difficulties, which do not exist in the present case, were got over in the case in the Year Book by issuing the special form of prohibition. There may be other cases in which such a special writ may be proper; for instance, there is authority for saying that, in matters purely of ecclesiastical cognisance, where a particular sort of evidence is refused which, according to the rules of the common law, ought to have been admitted—a matter which affects the manner and form of proceeding only—the prohibition is *quousque*. This is inapplicable to the present case; and, although in many cases in the books prohibition has been granted for rejection of a plea to the merits, in none can we find any trace of a suggestion unverified or of any prohibition issued therein *quousque* only. We must, therefore, treat such a special prohibition as exceptional, applicable only to the manner and form of proceeding and inappropriate to a case where a defence upon the merits has been rejected below and must be established here in law and in fact in order to sustain the prohibition. The special writs mentioned in Fitzherbert's *Natura Brevium*, 39 H., and in which directions were given as to the course to be pursued in the subordinate Court, in the nature of admonitions to such Courts, if or unless certain matters should judicially appear to them, relate to obsolete proceedings governed by peculiar considerations. Those writs were confined to the manner and order of proceeding, and were quite distinct in their character from a prohibition upon the merits. The writs in the Register and elsewhere which conclude with a mandamus to the Court Christian to recall an excommunication already erroneously fulminated or a sequestration wrongly issued, are all, as to the prohibitory part, peremptory, and the mandamus to revoke the unauthorised proceeding only accessory to the peremptory prohibition and necessary to give it effect. A mandamus

to the Judge of the Court of Arches to receive the responsive allegation, contrary to his solemn judgment already pronounced, which is presumably his final opinion, would be not only an anomalous, but, so far as the research of counsel and the industry of the Court enable us to judge, an unprecedented proceeding; and, if no such mandamus can be issued, then the litigation may never come to an end, if the case, so far as it is before us, be not once for all disposed of here. Our conclusion, therefore, is that the allegation which the Court of Arches rejected as constituting no defence to the libel, though assumed to be true, was so rejected by reason of an erroneous construction of the statute, being a matter of temporal cognisance, and this Court being of opinion that the rejected allegation was a complete and substantial answer to the libel in point of law, ought, *if and when such allegation shall appear to be true in fact, peremptorily* to prohibit any further proceeding": *White v. Steele* (12 C.B.N.S. 383).

*Holt, C.J.*: "Your suggestion contains two matters that ought not to go together; the one the denial of the copy of the libel, and the other upon the merits; for they are grounds for prohibition of different natures; the first for a prohibition only *quousque*, which is *ipso facto* discharged by granting a copy of the libel without writ of consultation; the other a peremptory prohibition which ties them up until a consultation, and upon such a suggestion we ought not to grant a prohibition. Indeed, if a prohibition until they give a copy of the libel be granted before any libel exhibited, it does not bind them from exhibiting a libel; but afterwards they shall not proceed until they give a copy of it; and then to have a prohibition on the merits you must make a new suggestion": *Anon.* (6 Mod. 308).

Prohibition to restrain Tithes Commissioner from making an award till a decision had been given in a cause pending in Chancery: *Re Crosby Tithes* (13 Q.B. 761).

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#### vi.—Right to Prohibition only taken away by Express Enactment or Necessary Implication.

"And, being intended for keeping every Court within its proper jurisdiction, the law as to prohibitions cannot be changed but by Act of Parliament: R. 2 Inst. 601. So, the form of a prohibition cannot be altered but by Parliament: 2 Inst. 601, 602."—Comyn's Digest, s.v. Prohibition (C.).

*Illustrations.*

“ The only section in the Act (20 & 21 Vic. Ch. 157) which requires separate attention is the 15th, by which ‘ no defendant shall be permitted to object to the jurisdiction of the Court, by any proceeding whatsoever, except by plea.’ This section, however, does not preclude the application for a prohibition by the garnishee, who, throughout the custom and the Act, is recognised as distinct from the defendant. Indeed, it may be doubted whether the attention of the Legislature was called to the indirect effect attributed to that section in *Manning v. Farquharson* (30 L.J.Q.B. 22) of taking away from the defendant in the Lord Mayor’s Court the right of moving for a prohibition because of want of jurisdiction. If the matter were *res nova* it might be thought that the section only took away from the defendant proceedings which he individually possessed the right to take as suitor or party aggrieved, such as arrest of judgment, error or action, and not prohibition, to which not only he, but the Crown, or any subject, even the plaintiff, might have resorted. It is, however, unnecessary to criticise the opinion of *Crompton, J.*, in *Manning v. Farquharson*, because, as explained by that very learned Judge in his judgment in this case when in the Exchequer Chamber, it does not affect the garnishee.”—*Willes, J.*, in *Mayor, &c., of London v. Cox* (L.R. 2 E. & I. at 259).

20 and 21 Vict. c. clvii., s. 15 provides that no defendant shall be permitted to object to the jurisdiction of the Mayor’s Court in or by any proceedings whatsoever except by plea. *Held*, that since the statute the defendant could not obtain a prohibition. *Quaere*, whether a stranger could have done so. Where the defendant pleads to the jurisdiction, the Court has power to determine the plea : *Manning v. Farquharson* (30 L.J.Q.B. 22).

Sec. 12 of the Mayor’s Court Act, 20 and 21 Vic. c. 157, enacts that no plea to the jurisdiction shall be allowed in the cases therein specified, and sec. 15, that no defendant may object to the jurisdiction except by plea. *Held*, that a stranger might apply for a prohibition, though the defendant was barred from doing so : *Evans v. Nicholson* (32 L.T. 664).

“ In the next place I think nothing is better settled than that an Act of Parliament which takes away the jurisdiction of a superior Court of law must be expressed in clear terms. I do not mean to say that it may not be done by necessary implication as well as by express words, but, at all events, it must be done clearly. It is not to be assumed that the Legislature intends to destroy the jurisdiction of a superior Court. You must find the intention not merely implied but necessarily implied. There is another principle, which is that the general rights



of the Queen's subjects are not hastily to be assumed to be interfered with and taken away by Acts of Parliament. . . . Now here the subject has a right, and a valuable right, of having the question of the jurisdiction of a local Court determined in the Superior Court, and is it to be assumed that that right was to be taken away and that he was to be compelled to submit the question of jurisdiction to the inferior Court itself? I think that is very unlikely."—*Jessel*, M.R., in *Jacobs v. Brett* (L.R. 20 Eq. at p. 6).

Sec. 15, Mayor's Court Act (20 & 21 Vic. c. 157) enacts that "no defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatsoever except by plea." *Held*, that the defendant was thereby precluded from applying for a prohibition: *Baker v. Clark* (L.R. 8 C.P. 121).

Sec. 15, Mayor's Court Act (20 & 21 Vic. c. 157) enacts that "no defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatever, except by plea." *Coleridge*, C.J., speaking of *Baker v. Clark* (L.R. 8 C.P. 121), said: "That case really arose in this way. It being suggested that sec. 15 of the Mayor's Court of London Procedure Act 1857 precluded the defendant from objecting to the jurisdiction of the Court otherwise than by plea, the applicant was recommended, in order to obviate the supposed difficulty, to renew the motion in the name of a stranger. The Master of the Rolls, in *Jacobs v. Brett* (L.R. 20 Eq. 1, 7), in a deliberate judgment, clearly demonstrates that that section relates only to the procedure in the Mayor's Court. I entirely agree with that very learned Judge, and so I believe do all the Judges with whom I have had an opportunity of speaking on the subject": *Bridge v. Branch* (1 C.P.D. 633).

Sec. 12, Mayor's Court Procedure Act (20 & 21 Vic. c. 157), enacts that "Where the debt or damage claimed in any action shall not exceed the sum of £50. no plea to the jurisdiction shall be allowed, provided the defendant . . . shall dwell or carry on business within the city of London . . . or provided the defendant . . . shall have dwelt or carried on business at some time within six months next before the time of the action brought, or if the cause of action either wholly or in part arose therein." Sec. 15 enacts that "no defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatever except by plea." Plaintiff sued defendant for £45 2s. 2d., part of the cause of action having arisen within the jurisdiction. Upon application for a prohibition, *held* that prohibition was taken away: sec. 15 entitles a defendant to object to the jurisdiction *only by plea*, and by sec. 12 no plea was allowed in such a case. Consequently, the jurisdiction could not be objected to in such a case. "That is equivalent to saying there

shall be jurisdiction. By a necessary implication it follows that the prohibition is taken away": *Haues v. Paveley* (1 C.P.D. 418).

" . . . . I think the decision in this case may be placed on safer ground, viz., upon the words at the end of the 7th section of the Salford Hundred Court Act (31 & 32 Vic. Ch. 130). But for those words the section would have been identical with the 15th section of the Mayor's Court Act, but this section goes on to say that "if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes." I think we must give some effect to those words beyond the effect given to the preceding words in the first part of the section. The language is peculiar; it does not say the defendant shall not take advantage of the want of jurisdiction in arrest of judgment or on a plea of the general issue or otherwise; such matters are already provided for by the first part of the section. It says that the Court shall have jurisdiction for all purposes. These words seem to me entirely to meet the observations of *Pollock, B.*, in *Oram v. Brearey* (2 Ex. D. 346), where he says that the jurisdiction of the superior Court is not to be ousted except by express provision. This enactment does not touch the question of the jurisdiction of the Superior Court to prohibit where there is no jurisdiction in the inferior Court. This provision is, after all, very just and reasonable; the substance of it is that the defendant shall not be allowed first to take his chance in the inferior Court and then, after so doing, to turn round and object to the jurisdiction."—*Lindley, L.J.*, in *Chadwick v. Ball* (14 Q.B.D. 855). See also *Payne v. Hogg* ([1900] 2 Q.B. 43).

Sec. 119 Local Courts Act 1886 requires every action to be commenced in the Court . . . nearest to the place where the cause of action arose, or to the place where defendant dwells or carries on business. The contract was made at Mount Gambier and the breach at Narra-coorte. As the contract as well as the breach formed part of the cause of action, the action was admittedly not brought at the Court nearest which the cause of action arose; neither was it brought at the Court nearest which defendant dwelt. On motion for a prohibition to restrain the plaintiff from proceeding in the action, it was argued that defendant's remedy by prohibition was taken away by sec. 119—that the defendant shall not be allowed to object that the action has not been commenced in the proper Court unless he files a memorandum of such objection, setting out the grounds thereof, at the time of entering his appearance; and by reason also of the jurisdiction of the Court given by sec. 120—"If, however, in the opinion of the Court . . . the plaintiff . . . may have had reasonable ground for supposing that such Court was the Court having jurisdiction . . . such Court may proceed to



hear and determine such cause and shall have jurisdiction therein.” “Now, the plaintiff relies upon certain *dicta* in the case of *Chadwick v. Ball* (14 Q.B.D. 855), in which the Lords Justices dissented from the case of *Oram v. Brearey* (2 Ex. D. 346), decided by Barons *Pollock* and *Huddleston*. So far as *Chadwick v. Ball* is concerned, the point arising there is not the same as that under consideration in this case. That was a case in which the defendant entered his appearance in the inferior Court, and having been unsuccessful there, endeavoured to obtain a prohibition in the superior Court. Therefore the observations of the Judges in that case so far as they conflict with the decision in *Oram v. Brearey*, are *obiter*, and their decision does not settle the point now before us. If it were necessary to distinguish the case of *Chadwick v. Ball* from that which is now before us, I should say that the language of the statute as to the local jurisdiction of the Salford Hundred Court of Record, is very much stronger than in the present case. The language there is ‘That no defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and if the want of jurisdiction be not so pleaded the Court shall have jurisdiction for all purposes.’ . . . I prefer to rest my decision on the long string of decided cases to which attention has been called by Mr. *Symon*, in which it has been held, on the construction of enactments corresponding to the present, that the jurisdiction by prohibition under which the superior Courts restrain the excesses of jurisdiction on the part of inferior Courts is only taken away by express language, or at least by clear and unmistakable language. By a long series of decisions it has been held that the language ‘that no defendant shall be allowed to object that the action has not been commenced in the proper Court unless he shall file a memorandum of such objection,’ means to object in the inferior Court, and that the language does not apply to the jurisdiction of the superior Court, and does not take away the jurisdiction of the superior Court to restrain the excess of jurisdiction on the part of the inferior Court. I do not think it necessary to go through the decisions brought before us which have removed any doubts which might have been created in my mind by the original decision of *Manning v. Farquharson* (30 L.J.Q.B. 22). It has been shown in the judgment of Mr. Justice *Willes*, in the celebrated case of *The Mayor of London v. Cox* (2 E. & I. App. Ca. 239), that that case went too far, and that very clear judgment of Mr. Justice *Willes* was followed by the Master of the Rolls in the case of *Jacobs v. Brett* (L.R. 20 Eq. 1), and *Bridge v. Branch* (1 C.P.D. 633). It is also consistent with the case of *Oram v. Brearey*, in which the very point was decided by the Exchequer Division on the statute which the Court of Appeal had before it in *Chadwick v.*

*Ball*. I have not the slightest doubt but that there was an excess of jurisdiction in this case, that the defendant is not bound to take objection to that jurisdiction and to take the chance of being able to satisfy the justices of the excess of jurisdiction ; that he has still the right to come here for the purpose of restraining it and that the rule for the prohibition ought to be made absolute.”—*Per Way, C.J. : Boucaut and Bunday, JJ.*, agreed : *Ellis v. Butler* (21 S.A.L.R. 136). Cf. *Fowler v. Hopkins* (22 S.A.L.R. 117).

“ It was objected by the respondent union that no prohibition lay from the Supreme Court to the Arbitration Court. This objection was founded upon sec. 32 of the Industrial Arbitration Act 1901, which provides that—“ Proceedings in the Court shall not be removable to any other Court by *certiorari* or otherwise, and no award order or proceeding of the Court shall be vitiated by reason only of any informality or want of form or be liable to be challenged, appealed against, reviewed, quashed, or called in question by any Court of Judicature on any account whatsoever.” It is said that this section altogether excludes the jurisdiction of the Supreme Court to interfere with the proceedings of the Arbitration Court in any way. There are two answers to this contention, one being that similar sections taking away the right to *certiorari* and other remedies have always been construed as not extending to cases in which a Court with limited jurisdiction has exceeded its jurisdiction. It has often been held that when the Legislature uses words in this well-known form they must always be taken to have intended the enactment to be subject to the rule I have mentioned. The other answer is that, where different parts of a statute are apparently contradictory, such a construction must, if possible, be put upon them as will render them all consistent with one another. [His Honour examined secs. 16, 26 and 28, and continued :] Thus not only is the jurisdiction of the Court itself restricted, but even the persons entitled to invoke its aid are limited and enumerated in detail. To hold in the face of these provisions that sec. 32 prevents the Supreme Court from checking any excess of jurisdiction would be in effect to give the inferior Court unlimited jurisdiction. For these reasons, I have no doubt that the Supreme Court had jurisdiction to grant a prohibition.”—*Griffith, C.J.*, in *Clancy v. Butchers, &c.* (1 C.L.R. at 196, 197). See also *Ex parte The Caterers & Restaurant Keepers' Association* (3 S.R. 19).

Sec. 96 Industrial Arbitration Act 1905 provides that “ proceedings in the Court shall not be impeached or held bad for want of form, nor shall the same be removable to any Court by *certiorari* or otherwise ; and no award order or proceeding of the Court shall be liable to be challenged appealed against reviewed quashed or called in question by

any Court of judicature on any account whatsoever." *Held*, that this section took away the power of the Supreme Court to grant a prohibition—at any rate “where the Court confined itself to the new subject matter in respect of which it was created”: *Blackball Miners v. Judge of Arbitration Court* (10 N.Z. Gaz. L.R. 633).

If s. 52 of the Industrial Disputes Act was within the powers of the Legislature to pass, the words therein “the validity of any decision shall not be challenged by prohibition or otherwise” take away the remedy by prohibition in respect of decisions of the Industrial Court. *Quære*, whether the section is *intra vires* of the Legislature: *Ex parte Newcastle Coal Co.* (8 S.R. 335).

Before the expiration of the Industrial Arbitration Act 1901 the applicant was summoned before the Industrial Arbitration Court for breach of an award; the summons came on for hearing after the expiration of the Act, and was heard before the Court created by the Industrial Disputes Act 1908. Applicant was convicted and applied for a prohibition on the ground of want of jurisdiction. *Held*, that notwithstanding that sec. 8 of the 1908 Act provides for the continuance of proceedings begun under the expired Act and that the enactments of this latter Act should apply to the continuation of such proceedings, yet sec. 52 of the 1908 Act takes away the right to a prohibition in respect of such proceedings: *Ex parte Baxter* (26 W.N. 24).\*

“Assuming that there has been an excess of jurisdiction of the Industrial Court, the question is as to the effect of sec. 52 of 1908 No. 3. If a statute in plain terms abolishes the writ of prohibition, this Court must hold that the King has so far abandoned his prerogative. There is no doubt that the latter part of sec. 52 is not couched in language that a lawyer would use, but I think it does mean that the writ of prohibition shall not issue to restrain the Industrial Court from further proceeding on its orders. It still leaves the right to the writ where the summons itself shows that the Court has no jurisdiction. The words of the section are ‘the validity of any decision shall not be challenged.’ Up to the time that the decision is given the writ still lies if material exists for showing that the Court is acting or about to act without jurisdiction. Probably, in the present case, if the applicant could have come to the Court after the evidence was given and before the decision of the Industrial Court, he would have succeeded. The section, therefore, does not, in my opinion, abolish the writ altogether, but does abolish it in cases where there has been a decision. I venture to hope that the Court will, in cases where its jurisdiction is doubtful, hold its hand and delay its decision so as to enable the question to be tested in the Supreme Court.”  
—*Pring, J.*: *Ex parte Baxter* (26 W.N. 24).\*

\* NOTE.—This case went on appeal to the High Court, but the report was not published when this book went to press.

A statute provided that offences against the Act were to be prosecuted before the Commissioners of Excise, with an appeal to Commissioners of Appeal, whose decision was to be final. On appeal to the Commissioners of Appeal, they acted on the minutes of evidence given before the Commissioners of Excise. A motion for a prohibition was opposed on the grounds that where a statute creates a jurisdiction and gives an appeal, that is the only remedy, and that prohibition was taken away by the words declaring the decision final. But a prohibition was granted *quoad* the admitting of such evidence: *Breedon v. Gill* (5 Mod. 271).

A provision in an Act of Parliament that the decision of the lower Court shall be final, does not take away the jurisdiction of the superior Court to grant a prohibition: *Roberts v. Humby* (3 M. & W. 120). Cf. *Ex parte Irwin* (10 S.C.R. 49).

And though sec. 37 (of 10 Vic. No. 10) makes the orders of the Court final and conclusive, that only applies when such Courts have jurisdiction, and, if their jurisdiction is exceeded, prohibition will issue (Com. Dig. Prohibition). "This writ is granted *ex debito justitiæ*, and being intended for keeping every Court within its proper jurisdiction, the law as to prohibitions cannot be changed but by Act of Parliament": *Re McMullen* (3 S.C.R. (Q.) 205).

"We are of opinion that the control of the Native Land Court is vested in the Native Appellate Court by secs. 57 and 58 (The Native Land Law Amendment Act 1895) and that sec. 59 gives supreme jurisdiction on the question in dispute in these proceedings to the Native Appellate Court. *So long as a Native Appellate Court is seised of a dispute between Natives and natives affecting the title to Native Lands, the Native Appellate Court may deal with it as it pleases. It may proceed contrary to what is called natural justice.* It may also adopt a procedure that an English Court, or the Supreme Court or Court of Appeal of this colony would not adopt, and if it does so, this Court cannot interfere. The Legislature has in fact clothed it with more power than it has given to the Supreme Court of New Zealand, and though thousands of pounds may be involved, the interests of natives are left to it unhampered by appeal or by the control of the Supreme Court or the Court of Appeal of New Zealand. This in our opinion, is the law, and it is not for this Court to inquire whether the law is wise or not. The Court must administer the law." : *Hakopa te Ahunga v. Seth Smith* (25 N.Z.L.R. 587).

Secs. 57 to 60 of the Native Lands Law Amendment Act 1895 do not take away the power of the Supreme Court to prohibit the Native Appellate Court in the case of bias or interest in the Judge. *Hakopa*

*te Ahunga v. Seth Smith* (25 N.Z.L.R. 587) distinguished : *In re Te Akau Block* (27 N.Z.L.R. 1).

“ We are of opinion that the common law right of prohibition is not taken away by the statute 14 Vic. No. 43, sec. 12, and 17 Vic. No. 39, secs. 3, 4, 5 (see now 1902 No. 27, sec. 112), which gives a cumulative remedy, partly in the nature of an appeal and partly in the nature of a prohibition :” *Ex parte Gaynor* (Legge 1299). [And see sec. 112 (7) of 1902 No. 27.] So in Victoria it is not taken away by the order to review provisions of the Justices Acts.

Defendant was not given sufficient notice of action in the Magistrates’ Court, and on motion for a prohibition objected that sec. 50 Resident Magistrates Act 1867 enabled defendant to apply for a new trial. But *Chapman, J.*: “ Does that take away prohibition ? The Court will not allow its jurisdiction to be taken away by a section which operates as a side wind ” : *Gregg v. Krull* (1 N.Z. Jur. 132).

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#### **vii.—Whether Writ lies when it can be of No Effect.**

See Part I., Chapter IX., p. 389,

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#### **viii.—Whether Existence of Another Remedy bars the Granting of the Writ.**

See Part I., Chapter VII., pp. 268, 274.



## CHAPTER I.

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### EXCESS OF JURISDICTION.

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#### A.—STATEMENT OF PRINCIPLES.

Prohibition is usually granted for plain excess of jurisdiction ; but where the inferior Court has jurisdiction, no mistake made in the exercise of that jurisdiction is a ground for prohibition.

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“ I have stated the observations generally, upon the nature of an application for a prohibition. The foundation of it must be that the inferior Court is acting without jurisdiction. It cannot be a foundation for a prohibition that in the exercise of their jurisdiction the Court has acted erroneously. That may be matter of appeal, where there is an appeal, or a matter of review ; though the sentence of a Court Martial is not subject to a review, there are instances, no doubt, where, upon application to the Crown, there have been orders to review the proceedings of Courts



Martial.”—*Lord Loughborough*, in *Grant v. Gould* (2 H. Bl. at 101).

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“ Another ground of prohibition, which indeed is but a species of the other (*i.e.*, excess of jurisdiction), is where an Act has passed with respect to any authority resident in other Courts, as in the Ecclesiastical Courts, in which there is an inherent jurisdiction. In such a case, the Courts of Westminster Hall have conceived that where the authority is limited by an Act of Parliament, the Court which acted differently from the prescription of the Act was in that instance exceeding its jurisdiction and therefore liable to a prohibition. Beyond these two grounds it does not occur to me that there is any other that can be stated upon which the Courts of Westminster Hall can interfere in the proceedings of other Courts where the matter is clearly within their jurisdiction. That they have decided wrong may be a ground of appeal, may be a ground of review, but not a ground of prohibition ”: *Grant v. Gould* (2 H. Bl. at 100, 101).

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“ A writ of prohibition never issues merely because a step taken in a Court below may have been unwise or unjust, nor because we may think a decision unsatisfactory, but only because we find that the Court has exceeded or is about to exceed its jurisdiction.”—*Coleridge, J.*, in *Zohrab v. Smith* (17 L.J.Q.B. 174).

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“ Several applications have been made of late to the Court for prohibition against justices who have made mistakes in the exercise of their jurisdiction, in all of which the Court has declined to interfere. As this matter has been argued, we shall not confine ourselves to merely discharging the order *nisi*. *There is a great difference*

*between the case of justices making a mistake in the exercise of their jurisdiction and the case of their having no jurisdiction at all.* It is clearly settled by authority that if an inferior tribunal has jurisdiction, *no mistake* made in the exercise of that jurisdiction is a ground for prohibition. It is a ground for an appeal, if an appeal lies. If no appeal lies, then the only remedy is an application for a new trial. In the case of the *South-Eastern Railway Co. v. The Railway Commissioners* (6 Q.B.D. 586), where the Railway Commissioners had jurisdiction over the general matter of the complaint and had also jurisdiction to order some of the things covered by their judgment, though not to order the others, the opinion expressed by the Court in allowing a general demurrer was that prohibition would lie only as to that part of the matter of the complaint which was clearly beyond their jurisdiction. *Brett, L.J.*, says (at p. 599): ‘The question upon the demurrer, then, is whether it is within the jurisdiction of the defendants to make all or any part of that order. This raises, first, the question what would cause such an order or part of it to be beyond jurisdiction as distinguished from being merely erroneous. *If no part of the order could legally be made under any circumstances in any form, the whole is beyond jurisdiction.* If there are separate parts which could under no circumstances in any form be legally made, those parts are beyond jurisdiction. But if the whole or any part could under some circumstances be properly made, though they would be improperly made under the circumstances of the particular case, that would be error and not excess of jurisdiction.’ The other members of the Court dissented from the conclusions of *Brett, L.J.*, but on grounds of a technical nature and not affecting the propositions of law which I have cited. In this case the most that can be said is that the judgment is improperly given under the circumstances of the particular case. It is perfectly clear that the justices had jurisdiction, and having it they could decide either way.

It cannot be seriously disputed that they had jurisdiction to give judgment as they did. Having that jurisdiction, if they exercised it erroneously, that would be ground for appeal, if any right of appeal exists ; but in any case there are no grounds for prohibition.”—*Griffith*, C.J., in *R. v. Rockhampton JJ.* (1903 S.R. (Q.) 71).

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“ I believe the verdict, so far as it is based upon the fact of an admitted set-off, to be absolutely wrong. . . . This is not a Court of Appeal from the magistrate, and, as he found a balance admitted, the verdict, no matter how erroneous and unjust it may happen to be, must stand.”—*Darley*, C.J., in *Ex parte Bourke* (19 N.S.W.R. 370).

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“ So long as the inferior Court acts within the limits of its jurisdiction, no prohibition will lie, however erroneous the decision of the Court may be in fact or in law.”—*Owen*, J., in *Hale v. Molloy* (4 W.N. 126).

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“ The rule which was laid down by the Privy Council in the case of *The Colonial Bank of Australasia v. Willan* (L.R. 5 P.C. 417, 443), is this : that if the Judge of an inferior Court properly enters upon an inquiry, but mis-carries in the course of it, the superior Court cannot quash his adjudication without assuming the functions of a Court of Appeal and the power to retry the question which the Judge was competent to decide.”—*Williams*, J., in *Simson v. Hunter* (11 N.Z. L.R. 705).

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“ The authority to grant prohibition is based upon the principle that it is the duty of the Crown to keep all Courts within the limits of jurisdiction prescribed to them by the statute law, and, unless that jurisdiction is exceeded or

unless in the determination of the matter properly before it the Court has acted in a manner contrary to natural justice, prohibition will not issue.”—*Burnside, J.*, in *The Coastal Boilermakers’ Industrial Union v. Millar’s Karri & Jarrah Co., Ltd.* (7 W.A.L.R. 288).

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“We agree with the argument addressed to the Court . . . that where an inferior Court is proceeding in a matter within its jurisdiction, prohibition will not go merely because the decision can be shown to be based on error in law or fact.—*Reg. v. Bolton* (10 L.J.M.C. 49) ; *In re Roche* (7 N.Z.L.R. 206)” : Full Court of New Zealand in *Winiata Te Wharo v. Airini Tonore* (14 N.Z.L.R. 209).

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“I think it would be a dangerous principle to lay down that for every mistake or unwaived irregularity which involves a failure of justice, this Court can grant a prohibition.”—*Hargrave, J.* (diss.) : *Ex parte Bucknell* (6 S.C.R. 96).

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#### B.—IN RESPECT OF WHAT MATTERS DEFECTS OF JURISDICTION ARISE.

Defects of jurisdiction may arise by reason of—

- i. The subject matter of the cause not being within the jurisdiction of the inferior Court.
  - ii. Some condition precedent to the exercise of jurisdiction by such Court not being complied with.
  - iii. The matter or party being outside the local limits of the jurisdiction of such Court.
  - iv. The status of the person sued in such Court.
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“The question of jurisdiction is of two sorts, the want of jurisdiction as to the subject of the suit, which can never be acquired, and the want of jurisdiction as to the locality

of the parties in the suit.”—*Sir John Leach*, in *Chichester v. Donegal* (1 Mad. & Gel. at 395).

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“There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge, or on the nature of the subject matter, or on the absence of some essential preliminary, must obviously in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that a Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal, and the power to retry a question which the Judge was competent to decide.”—*Privy Council in Colonial Bank of Australasia v. Willan* (L.R. 5 P.C. at 442).

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### **i. Subject Matter.**

Want of jurisdiction over the subject matter may exist either in regard to the subject matter of the claim or of the defence thereto.

In determining whether or not the subject matter of the action is



within the jurisdiction of the inferior Court, the substance and not the form of the proceedings must be regarded.

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“ The first question which a Judge has to ask himself, when he is invited to exercise a limited statutory jurisdiction, is whether the case falls within the defined ambit of the statute ; and it is his duty to decline to make an order as Judge, if and so far as the matter is outside the jurisdiction ; and if he does not do so he may (if a Judge of an inferior Court) be restrained by prohibition.”—*Davey, L.J.*, in *Farquharson v. Morgan* ([1894] 1 Q.B. 552).

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“ Where an inferior Court is proceeding in a cause which arises on a subject over which it has jurisdiction, no prohibition can be awarded till the party sued in the inferior Court sets up a defence on some grounds raising an issue which the inferior Court is incompetent to try. Until that is done, no ground for a prohibition has been shown.”—*Lord Cranworth*, in *Mayor, &c. of London v. Cox* (L.R. 2 E. & I. at 293).

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“ There is a third class of cases, in which the Judge of the inferior Court, having legitimately commenced the inquiry, is met by some fact which, if established, would oust his jurisdiction and place the subject-matter of the inquiry beyond it.”—*Privy Council* in *Colonial Bank of Australasia v. Willan* (L.R. 5 P.C. at 444).

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2. *Information, &c., disclosing no offence—Whether amendment thereof can be made.*—See ii. Condition Precedent, p. 107.

3. *No evidence to support adjudication.*—See Part I., Chapter III., p. 222.

4. *Proceedings by and against wrong parties.*—See Part I., Chapter III., p. 236.

5. *Amount involved—Abandonment of Excess—Splitting demand.*

Writ claims for “great damage.” Jurisdiction of Court limited to £40. Prohibition granted: *Viner*, Prohibition I. a 3.

A summons in the Small Debts Court claimed the restoration of goods, the aggregate value of which was stated as £17. An order for the restoration of two of the articles only was made, the value of these articles being under £10. A prohibition was granted on the ground that the amount was beyond the jurisdiction of the Court: *Ex parte Weingarth* (20 W.N. 136).

A resident magistrate at Wellington had given a verdict of 20s. for the plaintiff in an action for breach of contract for damages for non-delivery; the subject-matter of the contract was a carriage, which the plaintiff had bought for £130. It was objected that the Court had no jurisdiction, its jurisdiction being limited to £50 (Resident Magistrates Act 1867); for it was urged that if it had jurisdiction to entertain the suit for damages for non-delivery, the judgment in that suit could be pleaded as an estoppel in a cross suit to recover the price in another Court with a more extended jurisdiction. *Prendergast*, C.J., was not disposed to follow *Brown v. White* (2 V.R. (L.) 209): “It seems to me that the

language of our Act gives the magistrate jurisdiction where the damages claimed for breach of contract are within the pecuniary limits of jurisdiction": *Groves v. Somerville* (2 J.R.N.S. S.C. (N.Z.) 1).

The applicant had a verdict against him in the Small Debts Court for £13, on a plaint which claimed £30 in respect of a cause of action therein set out. *Stephen, J.*, thought the cause of action was for use and occupation, and as that is an action for debt, that the Small Debts Court had jurisdiction under the Act No. 13, 1899. *G. B. Simpson* and *A. H. Simpson, JJ.*, thought the action was for damages, and that as the claim was for £30, the Small Debts Court had no jurisdiction over the subject matter, and therefore prohibition was granted: *Ex parte Con Woy* (18 W.N. 36).

Plaintiff brought an action against defendant in the County Court endorsing his summons as a special summons under sec. 64 County Court Act 1890. The particulars indorsed on the summons alleged false misrepresentation in the making of a contract and claimed a return of £50 deposit paid thereunder. An alternative claim was made for money had and received £50. Objection was taken that the claim was not a debt or liquidated demand within sec. 64, but a prohibition was refused; the particulars disclosed circumstances which amounted to a claim for money had and received and the alternative claim did not alter the nature of the preceding claim and therefore the action was for a liquidated debt or demand within the section: *Horrigan v. McPherson* (29 V.L.R. 139).

Judgment in the County Court passed for £23 5s. 3d. debt and £5 1s. 8d. costs. The bailiff seized a brickyard worth £400 in execution and *Summers* interpleaded and now sought a prohibition to stay the interpleader proceedings on the ground that goods were taken in execution to a sum exceeding £50, and that the Court's jurisdiction was therefore ousted. But rule refused—"Where a suit is regularly brought in the County Court and its officer deals with property to *any* amount, all questions respecting that must be determined in that Court and we cannot interfere."—*Pollock, C.B.* : *Ex parte Summers* (18 Jur. 522).

Under 9 & 10 Vict. c. 95, s. 122, the County Court has jurisdiction if either the rent or the value of the land in question fall short of £50: *Harrington v. Ramsay* (2 E. & B. 669; 22 L.J. Ex. 326).

By a plaint in the County Court, defendant was summoned for a debt of £20 "for illegally practising as an apothecary." The particulars stated that the action was brought to recover £20 for that the defendant had after 55 Geo. III. c. 194, on divers days acted as an apothecary without a certificate at four places named. By sec. 20 of the Act any person who shall practise as an apothecary without a certificate shall

forfeit "for every such offence" £20. A prohibition was sought on the ground that it appeared by the particulars that the plaintiffs sought to recover or might recover four distinct penalties of £20 each, and consequently the County Court had no jurisdiction. But prohibition was refused; the Statement of Claim was ambiguous and might give rise to the question whether a number of acts done by the defendant at various times and places may be made the subject of more than one penalty, but "the County Court has jurisdiction whenever the claim does not exceed £20, or the plaintiff is willing to abandon all beyond it" *Apothecaries Co. v. Burt* (5 Ex. 363).

Plaintiff sued in a District Court to recover £122 10s., for wages due. The particulars showed that £330 8s. 4d. had become due and that defendant had paid £207 18s. 4d. There was a conflict on the affidavits as to whether the balance due had been admitted. On motion for prohibition before hearing, it was *held* that the case should proceed in the District Court; if it was shown that defendant admitted the correctness of the account, or that deducting the payments from the amount due there never had been more than £200 due, or that the payments made by the defendant from time to time were made in respect of wages due, leaving a balance of less than £200 due, then that Court would have jurisdiction: *Ex parte De Mestre* (21 N.S.W.R. 21).

Plaintiff sued defendant in a District Court for £200 "balance of account Carlisle Castle Hotel." Thereafter plaintiff was ordered to give further particulars and then filed particulars showing debits, £1046 11s. 4d. and credits £873 16s. 8d. When the case was partly heard, a prohibition was granted.—Where a plaintiff seeks by an admitted set off to reduce the amount claimed within the Court's jurisdiction, the set off must be admitted by the plaintiff *before action brought*: *Anderson v. Burrows* (9 N.S.W.R. 150).

Where a plaintiff abandons the excess of his claim over the limit of a magistrate's jurisdiction in order to bring his case within the jurisdiction of the magistrate, he is at liberty to prove any of the items in his particulars in full and recover up to the amount of the limit of the jurisdiction: *Re Broad*; *Harper v. Conway* (L.R. 1 S.C. (N.Z.) 79). Cf. *Wairau Hospital, &c., Aid Board v. Picton Hospital, &c., Board* (24 N.Z.L.R. 45).

A magistrate's jurisdiction was limited to £100; plaintiff sued for £104 2s. 5d., and at the foot of his claim abandoned "any sum that may be proved due by the defendant on the hearing of the cause over £100." The defendant proved two credits of £6 19s. and £1 and the magistrate gave a verdict for plaintiff for £96 3s. 5d., after deducting the two credits from £104 2s. 5d. A prohibition was refused: the credits should have

been deducted from £100—the limit which the plaintiff could recover ; but the error was one within the limits of the magistrate's jurisdiction : *Birch v. Parnell* (L.R. 3 S.C. (N.Z.) 413).

The abandonment of the excess of a claim above £50 in order to give a County Court jurisdiction, must be the act of the plaintiff himself or of some person authorised by him, and not the act of the Judge. Therefore, where a County Court Judge at the hearing of a plaint, of his own accord and against the consent of the defendant, amended the particulars of demand by reducing the claim to £50, and gave judgment for the plaintiff for that amount, the Court granted a prohibition : *In re Hill* (10 Ex. 726).

Plaintiff having a claim for over £50 sued in a County Court for £50. At the trial an entry was made on the particulars and judgment that he abandoned the excess over £50 (see sec. 63 of 9 & 10 Vic. c. 95, as amended by sec. 1 of 13 & 14 Vic. c. 61). A prohibition was sought on the ground that the Judge had no jurisdiction to try a plaint for part of a demand unless a disclaimer of the excess was entered on the proceedings at the time of plaint entered. While agreeing that it was held in *Vines v. Arnold* (8 C.B. 632) and *Brunskill v. Powell* (1 L.M. & P. 550) that the mere fact of suing for a portion of an entire demand is not an abandonment of the excess, but that some act of abandonment in the Court is necessary, the Court discharged the rule. The section allows abandonment of the excess either before or on the hearing : *Isaacs v. Wyld* (2 L.M. & P. 676).

A plaintiff sued in the Small Debts Court for debt, and obtained a verdict for £13 12s. 11d. The Small Debts Act (1899 No. 13, sec. 7) limited the jurisdiction in debt to £30. The particulars filed with the plaint showed that the plaintiff claimed £49 16s. 6d., but gave the defendant credit for £36 3s. 7d. There was no evidence that the defendant admitted the set off and a prohibition was granted upon the ground that the Court had no jurisdiction over the subject matter ; *Ex parte Kelly* (20 W.N. 186).

Applicant was sued before justices for £8 on balance of account, his particulars showed the debt to be £43 and credits £35. On verdict for plaintiff, a prohibition was granted. The plaintiff was entitled by statute to sue before justices for a sum not exceeding £20 ; he could not by giving credit bring the case under the jurisdiction of justices : *R. v. Clarkson* ; *Ex parte Haylock* (4 A.J.R. 116).

The plaint in the Small Debts Court showed certain items of goods sold amounting to £25 1s. 6d., but gave certain credits of goods returned by defendant to plaintiff amounting to £15 9s. 1d., and claimed the balance. Objection was taken to the jurisdiction on the ground that as

defendant did not admit the correctness of the items of credit, more than £10 was claimed. The magistrate admitted in evidence a book of plaintiff containing entries of returns as per credits in plaint; no one was called to prove the correctness of entries in the book. Defendant denied that the claim for £25 1s. 6d. was reduced by the return of the goods for which plaintiff gave him credit. *Held*, that the case was governed by *Brough's case* (12 S.C.R. 368); that as there was a claim for more than £10, and there being no reduction of that claim by an amount that was admitted by the defendant, the Court of Petty Sessions had no jurisdiction. If there had been evidence before the magistrate to show that the goods returned had been accepted as payment, then the case would have fallen within *Re Alp* (8 W.N. 57); the entry in plaintiff's books merely showed that the goods had been returned, but did not show on what terms they were returned. But *Stephen, J.*, points out "Even if the books did show that, the books were not legally admissible and the magistrate could not give himself jurisdiction by admitting evidence which was inadmissible": *Ex parte Gazzard* (15 N.S.W.R. 394). But see *Shop Assistants' Union v. Mark Foy* ([1906] A.R. 388).

A plaintiff sued in the County Court for a sum within the jurisdiction, but in his particulars of demand put his claim at a sum above the limit and gave credit for the balance. There being no evidence of an adjustment before action by any person able to bind the plaintiff, or of defendant's consent to treat the balance as a payment on account, a prohibition was granted on the ground that the Court had no jurisdiction: *R. v. Pohlman* (4 W.W. & A.C.L. 211).

A summons under Justices of the Peace Statute 1865, sec. 41, issued for a debt over £20; a prohibition was granted—the complainant does not bring the matter within the jurisdiction of the Court by allowing credit in his particulars for a cross claim to the amount of which the defendant does not agree, although he has entered a defence of set-off in respect of that very item: *R. v. Panton*; *Ex parte Wilson* (6 V.L.R. C.L. 33). [See now No. 1105 sec. 59.]

A cause of action arose more than 12 months before complaint; plaintiff sought to bring it within the justices' jurisdiction by giving credit for a cross demand—but this did not give jurisdiction, as defendant had not consented to the cross demand, and a prohibition was granted: *R. v. Webster*; *Ex parte Prentice* (1 V.L.R. C.L. 199).

Sec. 3 The Districts Court Jurisdiction Act 1893 gives that Court jurisdiction "over all cases of a civil nature, whether legal or equitable, in which the claim or demand shall not exceed £500." Plaintiff sued for an account from defendant as agent, but a prohibition was granted;



the only accounts that can be ordered are partnership accounts. Moreover, the total amount of the accounts exceeded £500, and there was no agreed balance, no admitted payment, and no admitted set off; the defendants said that they did not expect the accounts to exceed £500, but admitted nothing. A prohibition was granted on this ground also: "the whole of the accounts exceed £500 and all these must be investigated. . . . See *Hubbard v. Goodley* (25 Q.B.D. 156), and *Avards v. Rhodes* (22 L.J. Ex. 106)." — *Per Stout, C.J.*: *Thompson v. Campbell* (19 L.R. (N.Z.) 177; 3 Gaz. L.R. 48).

A complaint before justices claimed £17 18s. for work and labour. The particulars of demand stated an amount of £61 4s., and then reduced it by giving credit for several payments, leaving the above balance. A prohibition was refused—"The matter is ruled by *Nightingale v. Barnard* (4 Bing. 169), where the plaintiff was deprived of costs because his claim had been reduced below 40s. before action brought." — *Fellows, J.*, in *R. v. Mollison*; *Ex parte Parne* (1 V.L.R.C.L. 17).

Particulars of plaintiff's claim in the District Court showed debits as £1574 5s. 5d. and credits as £1411 7s. 1d., plaintiff claiming the balance £162 18s. 4d. A prohibition was granted—the term "balance of account" in District Courts Act, 22 Vic. No. 18, sec. 7, means balance which has been agreed upon and adjusted between the parties: *Ex parte Roberts* (15 N.S.W.R. 294). (But see now sec. 1905 No. 22, secs. 3, 6, and *Reynolds v. Hall* (25 W.N. 85).)

The defendant owed the plaintiff £13. The plaintiff executed a release for £3 and filed it in the Small Debts Court, and sued the defendant in that Court for £10. The defendant did not appear and knew nothing of the execution of the release. It was *held* that this was a splitting of the plaintiff's demand, and that the Small Debts Court had, therefore, no jurisdiction, *Darley, C.J.*, saying: "The remarks made in *Ex parte Buckley* (9 S.C.R. 72) and *Ex parte Brough* (12 S.C.R. 368), have been pressed upon us to show that the plaintiff may abandon an excess if he can put it out of his power ever to revive his claim, and I think it would be so where the consent of the defendant is obtained. But here it was done behind his back and against his will. I think, therefore, that the present case falls within the principle which has governed the decisions of this Court for many years, and that the rule ought to be made absolute with costs": *Ex parte Noel* (5 S.R. 445).

If there be one entire contract above 40s., and the suit for it is in a Court baron severing it into divers small sums under 40s., prohibition shall be granted because it is done to defraud the King's Court—19 Hen. VI., 54. (*Note*.—There have been several prohibitions granted in such



cases of late time.) *Vide* the statute of 11 Hen. VII. c. 19 accordingly : Viner's Abridgement, Prohibition, I. (a) 1.

Sec. 63 of Small Debts Act, 9 & 10 Vic. c. 95, enacts " that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts." A railway contractor gave his workmen orders for goods, which were supplied by the plaintiff, and the latter brought 228 actions in the County Court against the defendant in respect thereof for sums amounting to £303 19s. A prohibition was granted — though one claim amounted to only £5, and many to less than 20 shillings. " Cause of action " means " cause of one action " and is not limited to an action on one separate contract : *In re Ackroyd* (1 Ex. 479).

*Pattison*, J.: " I do not understand the Court of Exchequer to have said that wherever two causes of action can be joined it is a splitting to separate them." *Erle*, J.: " It is not a splitting of the cause of action to bring distinct plaints where in a superior Court there would have been two counts " : *Wickham v. Lee* (12 Q.B. 521).

A prohibition sought on the ground that the cause of action was divided under 9 & 10 Vict. c. 63, was refused where one plaint was for assault and the other on an agreement to pay for surgical attendance rendered necessary by the assault, *semble*, because the causes of action could not then have been joined in one action : *Hartley v. Ayurst* (11 L.T.O.S. 150).

Where some items of an account are for goods sold and others for money lent, the plaintiff may bring two separate actions in the County Court ; the items being of a different character and not constituting one " cause of action " within sec. 63 of 9 & 10 Vic. c. 95. Moreover, a plaintiff does not by merely suing for a smaller amount thereby abandon an excess above that amount due to him : *Brunskill v. Powell* (1 L.M. & P. 550). See *Isaacs v. Wild* (2 L.M. & P. 676).

Prohibition to restrain the plaintiff from splitting his cause of action opposed on the ground that the actions were for several deliveries of ale. *Sed per curiam* : If the causes may be joined in one action they must, and a prohibition was awarded : *Girling v. Aldas* (2 Keb. 617).

Summonses before magistrates for two sums of money due in debt from defendant to plaintiff. A prohibition was granted after verdict. There was a running account between the parties, and the plaintiff sought, by splitting his demand, to give jurisdiction to the inferior Court : *R. v. Daly* (1 A.J.R. 26).

Where in the County Court the defendant objected that the action was a splitting of the demand, *held*, that the Judge was not thereupon bound to stay his hand, but was entitled to proceed and ascertain

whether that was so or not : *Kimpton v. Willey* (9 C.B. 719 ; 19 L.J.C.P. 269).

A plaint in the County Court for £20 was removed by *certiorari* to a superior Court ; another plaint involving the same cause of action, but laying damages at £5 was then filed. *Held*, the pendency of the first action was no ground for issuing a prohibition as to the second action : *Edwards v. Rogers* (1 L.M. & P. 197).

Where several articles are wrongfully seized each conversion gives a separate right of action, and the cause of action is not split where the plaintiff brings separate actions in respect of the various articles : *Barker v. Marks* (6 N.Z.L.R. 529).

*Quære*, whether, when the amount of the entire demand which is alleged to have been split, is within the jurisdiction, a prohibition will go : *In re Ackroyd* (1 Ex. 479).

A resident magistrate, having only jurisdiction to the extent of £20, entertained and allowed a set-off exceeding that amount. Prohibition granted. The Act limits the jurisdiction as well to claims which are made the subject matter of set-off as to substantive causes of action sued on by a plaintiff : *R. v. Stewart* (2 Macassey 638n).

A prohibition was granted where, in an action before justices, a set-off exceeding the limit of jurisdiction was set up by way of defence and the justices refused to entertain the set-off and gave plaintiff a verdict—if satisfied that such a defence is *bona fide*, the justices should stay their hands : *R. v. Heron* ; *Ex parte Burnip* (9 V.L.R.C.L. 186).

Complainant had sued before justices for wages ; a set-off was pleaded under which defendant had a verdict for an amount in excess of complainant's claim. One of the items of set-off was for £47. It was held that as the items of set-off were in excess of the justices' jurisdiction, a prohibition should be granted : *R. v. Bond* ; *Ex parte Woodhead* (5 V.L.R.C.L. 130).

Where on a complaint before justices the defendant raises a set-off containing various items, it is the duty of the justices to disregard the set-off altogether, so far as regards these items involving matters from their nature outside the justices' jurisdiction, but to take evidence upon the other items. If from such evidence it appears that the set-off raises a *bona fide* claim for an amount exceeding £20 or not arising within twelve months of the complaint, they should make no order whatsoever—Sec. 48 Justices of the Peace Statute, 1865 No. 267 : *R. v. Garside* ; *Ex parte Mouritz* (11 V.L.R. 136). [See now No. 1105 sec. 80]

In complaints before justices under the Justices of the Peace Statute, 1865 No. 267, where a defendant raises by set-off a demand exceeding £20, or not arising within twelve months before the complaint

was made, the justices' jurisdiction to hear the summons is thereby ousted. But in all other cases of set-off, the justices should leave out of their consideration any item involving a matter outside their jurisdiction and inquire into the rest of the set-off and decide between the parties accordingly : *R. v. Panton* ; *Ex parte Good* (11 V.L.R. 227).

A. sued B. in the Mayor's Court in respect of a matter over which that Court had jurisdiction ; B. set up, by way of counterclaim, a demand for £89,000 in respect of a contract between him and A. in Utah, America. A prohibition was sought against B.'s counterclaim, but refused. B.'s claim could not have been sued for in the Mayor's Court as an original claim, but he was entitled to set up such a defence. Sec. 90 Judicature Act 1873 enacts that "When in any proceeding before such inferior Court any defence or counterclaim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counterclaim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy, so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counterclaim," and then goes on to provide for the removal of certain cases to a superior Court. It was *held* that the inferior Court could deal with a counterclaim which, if it were an original claim, would be beyond its jurisdiction, to the extent of answering the claim of the plaintiff, but not further. *Cotton*, L.J., said that the "defendant is to use the counterclaim as a shield but not so as to enable him by means of a judgment to obtain payment of a sum of money beyond the amount of the plaintiff's claim" : *Davis v. Flagstaff Mining Co.* (3 C.P.D. 228).

#### 6. *Period of Limitation.*

It was held on application for a prohibition that where a cause of action has arisen more than twelve months before the date of the complaint, the complainant cannot bring it within the jurisdiction of justices by giving credit, without defendant's consent, for a cross demand : *R. v. Webster* ; *Ex parte Prentice* (1 V.L.R.C.L. 199).

Though justices cannot entertain an action for a debt over twelve months old, if there has been a part payment within the twelve months, that raises an implied promise to pay the balance and gives the justices jurisdiction. A prohibition was refused where a judgment was given under such circumstances : *Ex parte Forsman* (4 V.L.R.C.L. 55).

Justices have jurisdiction under sec. 2 of the Justices of the Peace Act 1885 [see now No. 1105, sec. 201] to entertain a claim which accrued

more than six years before, if there has been part payment or an acknowledgment of the claim within the six years: *R. v. Shuter*; *Ex parte Johnson* (12 V.L.R. 676).

Action in Small Debts Court against a bailiff for not levying under a warrant of distress. The failure was on 11th December, 1880, and the plaint was not filed until 16th June, 1881—over six months afterwards. By sec. 39, Small Debts Recovery Act, such actions must be commenced within six months of the act complained of, and upon order made by the justices, a prohibition was granted—they had no jurisdiction, as the plaint was not filed within the statutory period: *Ex parte Russell* (Tarl. T.R. 45).

Where a verdict was given in the Small Debts Court in respect of rates, that were more than three years in arrears (see sec. 11 (3) of No. 13, 1899), a prohibition was granted: *Ex parte Egan* (15 W.N. 159).

A summons before justices under sec. 39 of Act No. 268, for disobedience of an order for payment of maintenance for an illegitimate child is not a “complaint or information” within sec. 51 Justices of the Peace Statute 1865. Where such summons was adjudicated upon more than twelve months after disobedience, a prohibition was refused—jurisdiction existed to adjudicate upon the summons: *R. v. Panton*; *Ex parte Sutterby* (1 V.L.R.C.L. 264). [Cf. *In re James Welsh* (9 V.L.R.C.L. 166), and see now Marriage Act 1890 (No. 1166), Part IV., and Justices’ Act 1890 (No. 1105), sec. 201.]

M. was charged before justices with issuing a false balance sheet—an indictable offence; objection was taken that the Court had no jurisdiction as by s. 201 Justices Act 1890 the justices could not hear the case because more than twelve months had elapsed between the date of the offence and the laying of the information. The justices overruled the objection, and a prohibition was now sought. All that the justices were doing was conducting a preliminary enquiry to determine whether there was a *prima facie* case against M.—if the defendant was right, the conclusion of the justices was an “order” within sec. 201 Justices Act 1890. *Hood, J.*, thought that (1) *the application was premature*, as the justices were not bound by the dates set out in the information, and were bound to commit for trial if the evidence disclosed an offence within the twelve months, and (2) the real meaning of sec. 201 was that it applies only to summary jurisdiction; all the justices in the present case had to do, was to see if a *prima facie* case were made out, and see further that according to sec. 45 the defendant

attended the higher Court : *In re Mercantile Bank* ; *Ex parte Millidge* (19 V.L.R. 527).

A complaint had not been laid within six calendar months from the time when the matter of complaint arose, as required by 11 & 12 Vic. Ch. 43, sec. 11. A prohibition was granted—that section limited the jurisdiction of the magistrates : *In re Prince* ; *Ex parte Binge* (1 W.W. & A.C.L. 12). But see *Ex parte Davis* (Legge 1305), Victorian Justices Act, No. 1105, sec. 201.

#### 7. *Costs wrongfully awarded.*

Where a person invoked the jurisdiction of an Ecclesiastical Court on a claim over which the Ecclesiastical Court had no jurisdiction, and his suit was dismissed with costs, the Court granted a prohibition ; if the sentence was a nullity, the order for costs must be so too : *Parton v. Knight* (1 Burr. 314).

On appeal to Quarter Sessions from a magistrate's decision, the Chairman decided that inasmuch as the decision appealed from was a decision dismissing the complaint, there was no jurisdiction to hear the appeal and dismissed the appeal with costs. *Held*, that there was no jurisdiction to award costs, and a prohibition was granted : *Ex parte O'Brien* (24 W.N. 197). Cf. *R. v. Cope* ; *Ex parte Smillie* (6 V.L.R.C.L. 366) ; *R. v. Cope* ; *Ex parte Rawson* (9 V.L.R.C.L. 294).

The County Court has no power to nonsuit or give costs when want of jurisdiction is established ; it can only declare its incompetence to try the suit. If it does more, prohibition lies : *Lawford v. Partridge* (1 H. & N. 621 ; 26 L.J. Ex. 147). Cf. *Ex parte Larry* (7 S.C.R. 183). But see District Courts Act Amendment Act, N.S.W., 1905 No. 22, sec. 25, and English Act of 1888, sec. 114.

An appeal under sec. 76 of the Factories Act 1894 was heard by a magistrate and dismissed with costs. A prohibition was granted on the ground that the magistrate had no power to grant costs. The concluding part of sec. 76 empowers the magistrate to confirm, reverse or modify the decision appealed against, and to "make such other order as may be just and reasonable." "Unless the statute authorising proceedings before a tribunal also gives the power to award costs, such power is not given. The general power conferred by sec. 76 merely refers to the making of an order regarding the matter of the appeal. Nor did sec. 169, The Magistrates' Courts Act 1893, which empowers a magistrate to award costs in 'whatever application or other proceeding' might by any statute be authorised to be taken in a Magistrates' Court, apply to applications in the nature of appeal or proceedings not regulated by the Magistrates' Courts Act."—*Per Prendergast*,



C.J. : *Andrew v. Collerton* (16 N.Z.L.R. 466). Cf. *McTaggart v. Hargreaves* (N.Z.L.R. 3 S.C. 77).

A prohibition was issued to the Court of Mines to restrain the enforcement of an order for costs made by that Court ; in cases under the Mining Statute, No. 291, that Court can order costs under sec. 230 ; but the Court also has a jurisdiction under the Mining Companies Limited Liability Act, No. 228, and, as no special power of awarding costs is conferred on it by that Act, it cannot award costs in proceedings thereunder ; the jurisdictions under the two Acts are separate and distinct from one another : *R. v. Bowman* ; *Ex parte Willan* (3 V.R.C.L. 213). [But see now Companies Act 1890 (No. 1074), s. 255.]

Where an Act of Parliament rescinded certain contracts for leases of land held by the Public Trustee and directed that compensation should be assessed by the magistrate, who was to proceed as if the claim were a civil action within his jurisdiction, *held* that the magistrate had jurisdiction to award costs : *Rangitaniwha v. Public Trustee* (10 N.Z. Gaz. L.R. 227).

A magistrate awarded costs of professional assistance in excess of the amount prescribed by sec. 54, The Resident Magistrates Act 1867. Upon application for a prohibition, *Williams, J.*, said : “ The 53rd section of the Resident Magistrates Act says that the amount of costs awarded shall be ascertained and stated in the judgment ; therefore, there should appear, on the face of the proceedings in the Court below, the amount of these costs. It is suggested, however, that although the awarding of these costs was objected to, and although the mistake appears on the face of the proceedings, yet this is not a case where a writ of prohibition ought to go, and the case of *Farrow v. Hague* (33 L.J. Ex. 258) was cited in support of that contention. The distinction between the case of *Farrow v. Hague* and the present is this ; that in the Act of Parliament under which *Farrow v. Hague* was decided there is a section which gives a general power to the Court to certify for costs without specifying any amount. In the Resident Magistrates Act there is no such section ” : *Duthie v. McGibbon* (10 N.Z.L.R. 514).

Magistrates, in a case under the Local Courts Act, struck out a case on non-appearance of plaintiff and awarded defendant £5 as compensation and his costs. The clerk entered judgment for defendant and taxed costs, which, with the £5, amounted to £9 13s., and upon that judgment execution issued against the plaintiff. In granting prohibition, *Hanson, C.J.*, said : “ Magistrates had no right to consider any question of remuneration when the Act fixed the remuneration to be allowed, and to allow certain extra costs because a person had brought



an attorney from a distance, was to violate the intention of the Act ” : *King v. Pocock* (0 S.A.L.R. 71).

Justices gave more than two guineas professional costs to the successful party in an action in the Small Debts Court. It was *held* that the costs are fixed by sec. 9 Small Debts Act 1867—they are given by the statute and not by the Court ; the statute fixes the amount at £2 2s., and the justices can only either reduce the amount or deprive the successful party of all costs—they have no jurisdiction to deal with the subject except to take away part or all of the two guineas : *R. v. South Brisbane JJ.* ; *Ex parte Zagami* (11 Q.L.J. 81).

A Mining Warden taxed costs in a lump sum without any reference to the Scale mentioned in sec. 228 of the Mining Statute, 1865 No. 291 : sec. 230 enables the Warden to award costs of suit. *Stawell*, C.J., on application for a rule *nisi* for a prohibition, said : “ It has not been shown that the amount awarded is greater than that which would have been arrived at by proceeding through the items according to Scale. The Warden had all the particulars present to his mind and it cannot be said that he had not jurisdiction to fix the amount.” *Fellows*, J. said : “ Supposing the Warden to have been wrong in what he did, *certiorari* would be the proper remedy if there is no appeal ” : *Ex parte Lawlor* ; *Re Strutt* (3 V.L.R.C.L. 1). [See now Mines Act 1890 (No. 1120), sec. 280.]

A prohibition was granted to restrain the enforcement of an order for costs made by justices on dismissal of a charge for an indictable offence. Justices have jurisdiction to award costs only in cases of summary jurisdiction : *R. v. Daly* (6 W.W. & A.C.L. 76). Cf. *R. v. Hare* ; *Ex parte Stark* (17 V.L.R. 80).

Where costs were awarded against a prosecutor upon the dismissal of a case against a prisoner who elected to be dealt with summarily, a prohibition issued : the justices had no jurisdiction under secs. 18-21 of 55 Vic. No. 5, to grant costs in such case : *Ex parte Liddiard* (16 W.N. 151).

So, where costs were awarded against a person so convicted : *Ex parte Uhrig* (21 N.S.W.R. 259). (But see now 1902 No. 27, sec. 147).

A magistrate exercising jurisdiction under the Immigration Restriction Act, 1901, has power to convict with costs : *Alexander v. Donohoe* (4 C.L.R. 781).

An articulated clerk appeared for his master on behalf of a plaintiff in the Court of Petty Sessions, and was awarded professional costs. Prohibition was granted. The Court had no jurisdiction to award professional costs except to counsel and attorneys : *Ex parte Graves* (8 W.N. 44). Cf. *Surplice v. B. H. Junction S. M. Co.* (3 W.N. 137).

Judgment in an action in a County Court was given for defendant with costs to be fixed by the Registrar ; the Registrar fixed the costs at £29 13s. 9d. The defendant then moved the Judge to allow extra costs which the Registrar had disallowed, and the Judge allowed a further £10 12s., and the Registrar thereupon amended the entry in the register by adding the words " Further costs allowed by the Judge, £10 12s." A prohibition was granted to restrain a variation of the amount of costs fixed by the Registrar. The Act and rules provided that if the Registrar fixed the costs, there was no taxation and could be no review. There was no jurisdiction to alter the amount of costs fixed by the Registrar : *R. v. Gaunt (Ex rel. Sellwood)* (26 A.L.T. 241 ; 11 A.L.R. 197 ; 1905 V.L.R. 302).

Foster made an application to the Commissioners for an order against a railway company to repair a canal. The Commissioners dismissed the application, but ordered the company to pay half of Foster's costs, not on the ground of anything which happened or was done or omitted in relation to the suit, but solely because they thought the company should at a previous date have given some notice that they did not own the canal or have the management of it. A prohibition was granted : it was admitted that if the Commissioners had ordered the company to pay costs of certain issues, the matter would have been within their jurisdiction, and no prohibition could go, however erroneous the decision might be ; but they had not in fact made the order on such grounds—they acted on the ground stated above, and, as they had no jurisdiction to order a successful plaintiff to pay costs, a prohibition was granted : *Foster v. G. W. Railway Co.* (8 Q.B.D. 515).

A prohibition was granted where a Local Court ordered a successful defendant to pay costs of the plaintiff. Sec. 259 Local Courts Act 1886 enacts that " the costs in every action or proceeding shall abide the event unless the Court at the hearing shall order otherwise, or shall make some special direction concerning them." These words were *held* not wide enough to give jurisdiction to order costs against a successful defendant : *Hodgkins v. District Council of Burnside* (25 S.A.L.R. 37).

Justices have no jurisdiction to order costs against a person not a party to the proceedings. Where on a prosecution by a police officer the information was dismissed with costs against the Police Department, a prohibition was granted : *Kavanagh v. Herbig* (9 W.A.L.R. 121).

A. was summoned as a witness in the insolvent estate of Sinclair to give information as to dealings between him and Sinclair (sec. 133 Insolvency Statute 1871). A. caused great delay by neglecting to provide the required information, and the Court ordered him to pay

costs (sec. 14 Insolvency Statute). A prohibition was granted—sec. 14, though very wide in its terms, did not give the Court jurisdiction to order a witness to pay the costs occasioned by his examination: *Re Sinclair*; *Ex parte Watson* (11 A.L.T. 95; 15 V.L.R. 736). [See now Act No. 1513, sec. 10.]

The Maryborough Chamber of Commerce, an association formed to watch over and protect the general interests of commerce, applied to the Land Court to redetermine a certain application by a notice of objection signed by the president and the secretary. Upon the case coming on, counsel for the Chamber of Commerce asked for an adjournment, and upon this being refused, the objections filed by them were withdrawn. The Land Court ordered payment of costs by “the Maryborough Chamber of Commerce, the members thereof and James Hockley, the chairman, jointly and severally.” It was *held* that the Land Court had no jurisdiction to order the association to pay costs; even if there was such jurisdiction, costs could be ordered only against the association’s property and not against the individual members. A prohibition was, therefore, granted: *The King v. The Land Court, &c.*; *Ex parte Hockley & Hanley* ([1904] S.R. (Q.) 253).

The Registrar of the Liverpool Court of Passage made an order on a plaintiff to give security for costs; by 6 & 7 Will. IV. c. 135, sec. 4, the assessor of the Court may make rules concerning the practice and costs of the Court, and he had made a rule that in frivolous and vexatious actions the registrar should have power to compel a plaintiff to give security for a defendant’s costs. A prohibition was granted—the assessor had no power to make such a rule, and the order was therefore without jurisdiction; though a frivolous and vexatious action is an abuse of process and should be stopped altogether, “how can there be power to make a rule, by which, if a man is rich enough, he is allowed to prosecute such an action?”—*Per Wills, J.*: *Reg. v. Mayor, &c., of Liverpool* (18 Q.B.D. 510).

By the Salford Hundred Court Act, 9 & 10 Vict. c. cxxvi., sec. 42, the Judge may certify for full costs where the debt or damage recovered is under 40s. The Judge granted a certificate in an action of slander, notwithstanding 21 Jac. I. c. 16, sec. 6. *Held*, that though the Judge might have no power to certify for costs that was not a ground for prohibition. *Martin, B.*: “I am clearly of opinion that is not the subject matter of prohibition. A prohibition goes when the Judge of an inferior Court assumes to himself jurisdiction which he does not possess and does a wrong, as if in this case the Judge had assumed a jurisdiction to try the action for slander when in fact he had no jurisdiction. But here the Judge having jurisdiction was called upon to

put a construction on the 42nd section of the 9 & 10 Vict. c. cxxvi., and say what in his judgment is the meaning of the words . . . He has decided that notwithstanding the 21 Jac. 1. c. 16, sec. 6, the general words of the 42nd section of the 9 & 10 Vict. c. cxxvi. enabled him to certify for costs. If that be a wrong decision it should be corrected by a superior Court. . . I should say that a writ of error will lie, but if it will not, and the decision is wrong, there has been a mistake for which there is no remedy": *Farrow v. Hague* (3 H. & C. 101; 33 L.J. Ex. 258).

The execution creditor having admitted the title of the claimant in interpleader, the latter applied for and obtained from the Local Court, *ex parte*, an order for the costs of the proceedings. *Held*, that the making of the order *ex parte* was a mere irregularity, and not a defect of jurisdiction, and not the subject of prohibition. A prohibition was refused, *Rooth, J., haesitante*: *Thom v. Hanlon* (10 W.A.L.R. 78).

The Divorce Court having dismissed a petition ordered the respondent to pay costs. A prohibition was refused by the Court, though the members of the Court urged grounds rather at variance with each other. But *Crompton, J.*, after pointing out that the Divorce Court has a discretion in ordering costs, said: "And even if that were not so and the Judge had made a wrong order respecting the costs, that is a question of practice and not a matter upon which it would be proper for this Court to grant a prohibition. I am of opinion that we ought not, in the exercise of our discretion, to entertain this motion on the application of a stranger": *Re Foster v. Foster* (4 B. & S. at 201). Cf. *R. v. Twiss* (L.R. 4 Q.B. at 413).

And see *Hanson v. Botten* (1905 S.A.L.R. 113); *R. v. Robinson* (O.B. & F. (S.C.) 88); *Hurrey v. Booth* (N.Z.L.R. 5 S.C. 251); *R. v. Dalby J.J.* ([1906] S.R. (Q.) 1; Q.W.N. 1); *R. v. J.J. of Central Bailiwick* (1 V.L.R. (C.L.) 302); *Wilson v. Stratford* (N.Z.L.R. 3 S.C. 329); *In re Bulcock* (1 Q.L.J. 103); *Ex parte Mulholland* (11 S.C.R. 310); *R. v. Leech* (6 V.L.R. (C.L.) 189); *R. v. Harvey* (O.B. & F. 165); *Smith v. Blower* (N.Z.L.R. 1 S.C. 329).

#### 8. Power of inferior Court to amend.

Where a summons in the Small Debts Court was amended by justices so as to make it appear that the action was brought, not by the father (the original plaintiff) but by the father on behalf of his son, *held*, amendment could not have misled defendant, as it only made more clear what was already quite clear, and was within the power of justices under sec. 42 of 10 Vic. No. 10 (see now 1899 No. 13, sec. 62: *Ex parte Osborne* (14 S.C.R. 338).

An application for a plaint in the County Court was correctly made and the plaint itself was correctly entered in the County Court against the defendant as executor of "F. W. Taylor," but the summons described him as executor of "W. Thompson." The Judge, at the hearing, upon its being pointed out to him that the Statute of Limitations would intervene to bar the plaintiff's claim, directed a fresh summons to issue, bearing the same date and number as the first; a prohibition was refused—the Judge was justified in treating the first summons as a nullity: *Foster v. Temple* (5 D. & L. 655).

A plaint in the Magistrates' Court was issued against the defendant who was the manager of a company, describing him as "M., attorney for the company." The contract on which the action was brought had been made with the company, and at the hearing the magistrate amended the plaint by striking out the words "M. attorney for." *Held*, that the powers of amendment possessed by the magistrate under the Resident Magistrates Act 1867, sec. 80, being identical with those conferred by sec. 222 of the Common Law Procedure Act 1852, the amendment was properly made. *Bolingbroke v. Townsend* (L.R. 8 C.P. 645) followed. *Guy v. The Ferguson Syndicate Co., Ltd.* (10 N.Z.L.R. 405).

A vestry, after certain meetings, passed a resolution to borrow money and notice of the holding of the vestry in accordance with 56 Geo. III. c. 69, sec. 1, had been duly given. A. was sued in a spiritual Court for not paying a rate made in pursuance of the above resolution, and the libel, in setting out the cause of action, stated that notice had been given; the notice specified was not the one actually given and was not in accordance with the statute. Upon affidavit showing that by their practice the spiritual Court would in such circumstances allow an amendment of the libel, it was held that, if the additional article were included, the Court would have jurisdiction and rule discharged, the Court considering the amendment as duly made: *Blunt v. Harwood* (8 A. & E. 610).

Where an inferior Court has no jurisdiction by reason of the fact that a statutory condition precedent is not complied with, the Judge cannot amend the proceedings so as to give himself jurisdiction. Thus, where a plaint note by assignee of a debt against the debtor, omitted to state the name of the assignor (Magistrates' Courts Act 1908, sec. 62), *held*, that the magistrate could not amend the plaint note: *Friedlander v. Miller* (28 N.Z.L.R. 97; 11 Gaz. L.R. 354).

If the particulars of claim show a cause of action outside the jurisdiction of the County Court, the Judge cannot amend them so as to



turn the cause of action into one over which he has jurisdiction. If he does so, prohibition lies : *Hopper v. Warburton* (32 L.J.Q.B. 104).

Where the plaint as framed set up a cause of action which turned out to be without the local limits of jurisdiction, but on the same facts a plaint could have been framed so as to bring the cause of action within those limits, a prohibition was refused, the Court holding that the plaint should have been amended below : *R. v. Isisford JJ.* ; *Ex parte Armstrong* (1902 S.R. (Q.) 250).

The defendant took out a summons under sec. 84, Goldfields Act, which gives the Court of Mines jurisdiction to “reverse or vary” the decision of a Warden. The defendant took out the summons leaving out the words “or vary.” The respondents applied to have the summons altered, the applicant opposing ; but the Court of Mines made the alteration. The applicant did not withdraw his summons, or apply to do so, but took part in the subsequent proceedings and the Court increased the judgment in favour of the respondents. The applicant (defendant in the Warden’s Court) then moved for a prohibition on the ground that the Court of Mines had exceeded its jurisdiction by amending the summons. The Court refused a prohibition : Sec. 84 of the Goldfields Act gave the Court jurisdiction to “reverse or vary,” and the form of the summons could not take away that jurisdiction—that was given by the Act and could not be taken away by the suitor. “When the amendment was made by the Judge, the course for the appellant was, if he did not wish to act upon a summons so amended, to pay the costs and withdraw his appeal. He stayed, and, though he protested, he took part in the proceedings. The Judge had jurisdiction” : *Ex parte Clarke* ; *In re Jenkinson* (1 W. & W. C.L. 209). [See No. 1120, sec. 257.]

The Native Land Court Acts Amendment Act 1889, sec. 13, gives a Land Court power to remedy “any error or omission committed or made in any decision or order of the Court” ; that Court proceeded to remedy a decision which expressed the real intention of the Court, but was in fact the result of a misapprehension in the mind of the Court ; it was *held* that the alleged error was not an error within the meaning of the section and a prohibition was granted : *Winiata Te Wharo v. Airini Tonore* (14 N.Z.L.R. 209).

Justices made a Protection Order (see 28 Vic. No. 29, sec. 11) in favour of a married woman, but the wife’s solicitor, in drawing up the order drew it to take effect from the date of desertion, and the justices signed it in that form. Thereafter, on the application of a creditor of the husband, the justices varied the order and dated it as from the time of the application—they had not in fact made the order as drawn by the solicitor, and,



though they had signed it, they had power to vary the order so as to make it state what they had in fact intended to order : *In re Kermode* (4 S.C.R. (Q.) 211).

#### 9. *Justice functus officio.*

A Judge of the Mayor's Court made an order without jurisdiction, referring a matter to arbitration. He subsequently rescinded the order, but a prohibition was granted—he had no power to make the second order, as he was *functus officio* : *In re The London Scottish Permanent Building Society* (63 L.J.Q.B. 112).

A Court of Mines had granted a second rehearing of an appeal. It was *held* that they had power to grant only one rehearing and a prohibition was granted : *Dennis v. Vivian* (1 W.W. & A.C.L. 201).

Justices had made an order against K., and his appeal to a District Court had been dismissed, as no notice of trial had been given. The appeal came on again at the next practicable Court, when the Judge reversed the order of the justices and quashed the conviction. The prosecutor applied for a prohibition on the ground that when the appeal was dismissed on the first occasion, the Judge's jurisdiction had gone. The District Courts Act, 55 Vic. No. 33, secs. 152, 153, in dealing with prohibitions to the District Court, enacts *inter alia* that the application "shall be proceeded with and heard in the same manner in all respects as a case of an appeal duly brought from a judgment of a Judge." It was *held* that the Judge had no jurisdiction to hear the appeal, as he had once dismissed it. That being so, the Court *held* that they could give judgment as they might have done in an appeal under sec. 152. A prohibition was refused and the judgment was "that the second order of the District Court Judge be reversed, and that the order of the justices be restored : " *Raven v. Kesterton* (4 Q.L.J. 216).

A spiritual Court cited churchwardens to bring in their accounts, as the Court had jurisdiction to do ; the Court thereupon examined the accounts, disallowed certain items and ordered the churchwardens to make good these items. A prohibition was granted ; when the churchwardens had delivered their accounts, they had done all that the spiritual Court could force them to do—there was then an end of the jurisdiction of that Court ; it was *functus officio* : *Leman v. Goulty* (3 T.R. 3).

Judgment having been given for the defendant in the County Court, the defendant left the Court. Subsequently, and, as the defendants swore they believed, after the Court had broken up, the Judge rescinded his decision and ordered a new trial, on which he gave judgment for the plaintiffs. The affidavits in answer did not show affirmatively when

the alteration was made, but a copy of the register was produced, in which it was stated to have been made at the same Court. *Held*, that there was an excess of jurisdiction and a prohibition went: *Jones v. Jones* (17 L.J.Q.B. 170).

A County Court Judge dismissed a case, signed the decree and issued it to the party interested therein. After the termination of the sessions in which the dismiss was made, the Judge amended the entry in the book of the Clerk of the Peace. A prohibition was granted—after the termination of the sessions he had no power to amend the entry, even for the purpose of correcting an inadvertent variance between the entry as made in the book and as expressed in the decree issued, and the decision as orally pronounced: *Smith v. McGlone* (L.R. (Ireland) 8 Q.B.C.P. & Ex. 267).

If a Judge of a County Court (No. 345, secs. 72, 78) has announced his decision, entered it in his book and has left the Court, although intending to return, he has no power on his return, in the absence of one of the parties, to correct a mistake in his decision. Where a Judge did so, a prohibition was granted. *Seem*, he has no power to alter his decision at all after such a hiatus: *R. v. Hackett*; *Ex parte Cline* (8 V.L.R. C.L. 129). [See No. 1078, secs. 89, 96.]

In a District Court action, verdict went for plaintiff on 23rd June, for £5 9s. 1d. On 12th July, notice was given of an application to have the verdict amended by increasing the amount to £15 9s. 1d., and on September 11th the Judge made an order to that effect, it being clear that a clerical error had been made. A prohibition was granted—the Court at which the original verdict was given having closed, the Judge had no jurisdiction to alter his verdict. *Re Downes v. Lethbridge* (Tarl. T.R. 180): Cf. *Irving v. Askeu* (L.R. 5 Q.B. 208).

A District Court Judge gave a verdict for a plaintiff against an executor. At a subsequent sitting of the Court the Judge ordered judgment to be entered up in one of the forms provided in the District Court rules for cases where an executor is sued in his representative capacity; the judgment so drawn up was dated as of the date of this second order, and not of date of the judgment. *Held*, not a matter for prohibition—it was a mere mistake by an officer of the District Court in minuting the judgment of the Judge: *Ex parte Palser* (2 S.C.R.N.S. 71).

Plaintiff sued in a County Court for personal injury sustained by him while lawfully on the defendant's premises. After judgment for the plaintiff, defendants sought a new trial, and the Judge on this application set aside the verdict for the plaintiff, and entered judgment for the defendant. A prohibition was granted; the Judge had no jurisdiction to alter the judgment first given by him and enter it for defendant;

by sec. 93 of the County Courts Act 1888, every judgment is final and conclusive between the parties except in certain specified cases : *Robinson v. Fawcett* ([1901] 2 K.B. 325).

*Semble*, that where a Judge of the County Court grants a new trial after having previously refused it, a rule for a prohibition will be granted: *Mossop v. L. & N.W. Ry. Co.* (16 C.B. 580).

A deputy County Court Judge heard a case and reserved his decision. Before the decision was delivered, the Judge whose deputy he was died. The deputy Judge then sent a written statement of his decision to the Judge's successor, who received it and entered it as his judgment. *Cockburn, C.J.* : "It was the duty of the Judge to hear and determine the matter of the plaint, and the question is whether it is not the duty of the Court to prohibit the Judge of the County Court from determining without hearing." *Willes, J.* : "The order was made by a deputy Judge after his deputation had ceased, after the death of the Judge whose deputy he was, and after the appointment of a new Judge. It is not, therefore, the judgment of a competent Judge . . . this order cannot stand as the order of the deputy Judge. But it is then said that it may stand as the order of the new Judge. The objection to that is that he has not heard the matter." A rule *nisi* for a prohibition was granted to the new Judge, in order to give the parties an opportunity of applying to the new Judge for a rehearing : *Hoey v. McFarlane* (4 C.B.N.S. 718).

An action had been "struck out" in the District Court, and, upon its being subsequently allowed to be restored to the list, a prohibition was sought against this latter order, on the ground that the matter had been struck out from all the books of the Court (sec. 63, District Courts Act, read with sec. 46) and therefore there was no jurisdiction to restore it : *Mossop v. L. & N.W. Railway* (16 C.B. 580) ; *Jones v. Jones* (5 D. & L. 628). But the rule was discharged. "Struck out," in sec. 63, merely means struck out from the cause list of the day ; there was, therefore, jurisdiction to restore the case to the list : *In re Bradley* (S.M.H., Sept. 9th, 1865).

A County Court Judge struck a case out on the ground that he had no jurisdiction, but he subsequently granted a new trial. By 9 & 10 Vic. c. 95, sec. 89, the County Court Judge was empowered to grant a new trial "in every case whatever," which section was practically re-embodied in sec. 93 of the County Courts Act 1888. A prohibition was sought on the ground that the Judge was *functus officio*, as he had decided that he had no jurisdiction, and that he could not, in such a case, grant a new trial. A prohibition was refused—"though the decision here was as to the jurisdiction and not as to the merits, I think

that is one of the cases in which the County Court Judge could grant a new trial" : *Lister v. Wood* (23 Q.B.D. 229).

A small debts case was dismissed in the absence of plaintiff ; the magistrate subsequently restored the case to the list, and, on the case coming on for hearing, found for the plaintiff. A prohibition was refused, it appearing that the defendant in fact had notice of the restoration of the case and of the day fixed for the hearing. " We cannot go into the merits of the claim. There was jurisdiction and that is quite sufficient to prevent the making of this order absolute."—*Chapman, J.* : *Sloane v. Hughes* (1 Macassey 425).

A case in the Small Debts Court, having been called on for hearing, was adjourned for 14 days, and an order was made that the plaintiff pay a fixed sum for costs of the adjournment within five days or the case be struck out. The costs were not paid within the five days. Subsequently on the application of the defendant, the plaintiff was nonsuited, and ordered to pay costs. A prohibition was granted—on the failure of the plaintiff to pay the costs within the five days the case was at an end, and the justices had no jurisdiction to make any further order : *R. v. Gympie JJ.* ; *Ex parte Elliott* ([1902] S.R. (Q.) 325).

A County Court Judge ordered imprisonment of a debtor for 40 days under sec. 5 of the Debtors Act 1869 (32 & 33 Vic. c. 62) for non-payment of a debt and costs under a judgment. The debtor's discharge was ordered by a superior Court on the ground of privilege, and the County Court, under a fresh judgment-summons, ordered the debtor to be again imprisoned for 40 days for the same debt and the additional costs. " Sec. 5 authorises one commitment for a period not exceeding six weeks for one default ; and where the order is for payment of the debt by instalments, the party may in like manner be committed for each default. Here, the Judge having made an order for the commitment of the defendant for default in payment of the whole debt, I am of opinion that he had no jurisdiction to issue a second for the same default, and therefore that the prohibition should go" : *Horsnail v. Bruce* (L.R. 8 C.P. 378). Cf. *R. v. Brompton County Court Judge* (18 Q.B.D. 213) ; *Stonor v. Fowle* (13 A.C. 20).

Where a debtor has once been committed upon a judgment summons under the Debtors Act (32 & 33 Vic. c. 62, sec. 5), for non-payment of a debt, though for a period short of six weeks (the limit imposed by that section), a second warrant of commitment cannot issue against him in respect of the same debt. Where, however, the order or judgment makes the debt payable by instalments, the debtor may be committed for the full period of six weeks on default in payment of each instalment. So, a debtor was committed for 14 days for non-payment



of a judgment and served his sentence ; subsequently, a second order was made against him in respect of the same debt and costs, and further costs. A prohibition was granted : *Evans v. Wills* (1 C.P.D. 229).

An order was made in the County Court for payment of the amount of a judgment by instalments and for commitment to prison in default ; defendant, on default, was arrested under a warrant of commitment for the whole amount, but immediately discharged by the plaintiff on a part payment with a promise of payment of the residue ; on default in payment of the residue, a second judgment summons was issued. A prohibition was granted—the jurisdiction was exhausted by the first order : County Courts Statute, 1869 No. 345, secs. 83, 84 : *R. v. Cope* ; *Ex parte Fraser* (2 V.L.R.C.L. 261). [See No. 1100, secs. 15, 16.]

A. sued B. in a Local Court, but, following a recent decision that the Legislature had no power to establish such Courts, the magistrate refused to try the cause. Then a validating Imperial Act was passed making local Courts valid, and B. set the case down for trial and served notice of trial on A. A. did not appear, and judgment was given for the defendant with costs. Upon motion for a prohibition, *Hanson*, C.J., delivering the judgment of the Court, discharged the rule. “. . . the ground relied on was that the case having been once set down for trial and not tried, although it had been adjourned, the Court became *functus officio* and had no further power in the matter. We think, if from any circumstance whatever a local Court which is to be held at a certain time is not held, and nothing at all is done, this does not oust the jurisdiction or compel all the parties who had initiated proceedings to commence *de novo*. We think, therefore, that this is not a case for prohibition. We do not express any opinion as to the propriety of the conduct of the magistrate in ordering costs, nor do we say that other remedies are not open to the plaintiff. We only say that this is a case in which a special magistrate had jurisdiction, and that a prohibition will not lie” : *Patten v. Phillips* (0 S.A.L.R. 37).

10. *Title to land—Future rights—Bona fide claim of right—Easements, Customs, &c.*

“. . . In every case where the thing sued for is not land, and the title to land can only be incidentally in question, there is a preliminary inquiry as to whether the title is really in dispute. A mere claim or assertion of title is not enough : see *Emery v. Barnett* (27 L.J.C.P. 216) and *Hawkins v. Rutter* ([1892] 1 Q.B. 668). In *Lilley v. Harvey* (17 L.J.Q.B. 357), Mr. Justice *Wightman* said : “ They (meaning the cases cited) seem to me to show that it is not enough for a man merely to say

'I claim the premises as an owner,' but he must show some reasonable ground to satisfy the Judge as against the plaintiff; and if the Judge should in fact be wrong in his decision, and the Court be satisfied that the title did come in question, a prohibition would go.' And in delivering judgment the same learned Judge also said: 'It can hardly be intended by the statute that the *mere assertion* of the defendant that he claims title, or that it is in question, will suffice to take away the jurisdiction; the Judge must be satisfied that it is in question, and for that purpose must have authority to inquire into so much of the case as is necessary to satisfy him upon that point.' A like decision was given in *Lloyd v. Jones* (6 C.B. 81; 17 L.J.C.P. 206). In *Mountney v. Collier* (22 L.J.Q.B. 124), Mr. Justice *Erle* said: 'The only matter then, was *whether it was a bona fide defence with some evidence to support it, or whether it was a mere illusory claim made with a view to oust the jurisdiction of the County Court.*' The case of *Marsh v. Dewes* (17 Jur. 558), does not in fact conflict with these decisions. Baron *Parke* there said: 'If the question here had been respecting damage charged to have been done to this dwelling house, or the value of goods taken in it, and the defendant had set up a false title to the house or goods in order to prevent the Judge exercising his rightful jurisdiction, there then would have been a *mala fide* claim of title, and the County Court would have had jurisdiction over the cause. But the question raised here and the question which the parties came to try was—had the defendant a right to this dwelling-house as against the plaintiff? That is a claim of title to land, and whether made *bona fide* or *mala fide* is immaterial for the present purpose.' Here there was no claim to land. The claim was really for taking away wire, the property of the respondent. It was only when the appellants failed to prove that the wire was theirs that they set up the defence that the fence was on their land, and that the wire, being on the fence, was theirs and that the magistrate had no jurisdiction. I do not see how it can be said that the title to the land was *bona fide* in dispute. The setting up of the title to the fence was made without a tittle of evidence, and, in my opinion, was a mere illusory claim to oust the jurisdiction of the Court. As to the second point (*viz.*, that the title to land was only incidentally in dispute, and that the lower Court had jurisdiction under sec. 34, The Magistrates' Courts Act 1893) it is, I think, clear that the action was not brought to determine any title to land. It was to obtain damages for removing wire placed on a fence by the respondent. The case therefore comes within that class of cases meant to be covered by the 34th sec. of our Magistrates' Courts Act. *Davis*, in his *County Court Practice*, 6th ed., 25, gives a case like this as one meant to be provided for under a section



similar to ours in 19 & 20 Vic. c. 108. He says ‘An action may be brought for the value of a tree which it is alleged that the defendant has wrongfully cut down. The defence may be that the tree was growing in the defendant’s land. The question of the title to the freehold then becomes a question incidentally arising in the cause, but which must be decided in order to dispose of the claim.’ The case he mentions would be more likely to raise title than this one, especially when the wire was put on the fence with the assent of the appellants, and the respondent’s right to repair the fence was never questioned till the case was heard. In the case of *Tait v. McCallum* (13 N.Z.L.R. 232) the view taken of the 34th section followed the opinion expressed in Davis’s treatise. I fail to see, if the section means anything, that this is not properly a case within its provisions.”—*Stout, C.J.*, in *Kilminster v. Monaghan* (21 L.R. (N.Z.) 522).

“It was, however, contended for the defendant that it was enough for him to state upon oath that he believed the premises were his to bring the case within the proviso, and to take it out of the jurisdiction of the County Court, and that the Judge had no jurisdiction to enquire further. It appears to me that if the Judge has authority to ascertain whether the title really is in question, it is very difficult to define the limit to which his enquiry may go. It can hardly be intended by the statute that the mere assertion of the defendant that he claims title or that it is in question, will suffice to take away the jurisdiction; the Judge must be satisfied that it is in question, and for that purpose must have authority to inquire into so much of the case as is necessary to satisfy him upon that point. Where there are special pleadings, and the question can be raised upon them, the Judge can go no further; but where the question is not raised upon the pleadings, but is merely suggested by the defendant, the Judge must inquire into the circumstances before he can be satisfied that title does come in question. If he is wrong and assumes jurisdiction when the title really is in question, the defendant upon making that appear to the superior Court would be entitled to a prohibition. The cases that have been decided on the 53 Geo. III. c. 127, sec. 7, are authorities for this view of the case. The terms of the provisions of the two statutes are not the same, but the point in question is common to both. In *R. v. Chapel Wardens of Milnrow* (5 M. & S. 248), and *R. v. Wrottesley* (1 B. & Ad. 648; 9 L.J.M.C. 51), it was considered that the justices in a case under the 53 Geo. III. must be satisfied that there is a *bona fide* intention to dispute the rate before they are bound to stop. If notwithstanding reasonable evidence that the title is really in question the Judge of the inferior Court still goes on, his assumption of jurisdiction may be superseded by

a prohibition ; but in the present case it appears to me that the Judge of the County Court was right, and that title did not really come into question in this case. The rule therefore will be discharged” : *Lilley v. Harvey* (17 L.J.Q.B. 357).

A. sued B. in the County Court for trespass to a dwelling-house ; A. claimed title under X. and B. claimed under Y., but the Judge tried the case. A prohibition was granted. “ If the question here had been respecting damage charged to have been done to this dwelling house, or the value of goods taken in it, and the defendant had set up a false title to the house or goods in order to prevent the Judge exercising his rightful jurisdiction, there would then have been a *mala fide* claim of title, and the County Court Judge would have had jurisdiction over the cause. But the question raised here and the question which the parties came to try was—had the defendant a right to this dwelling house as against the plaintiff ? That is a claim of title to land and whether made *bona fide* or *mala fide* is immaterial for the present purpose.”—*Per Parke, B.* And *Alderson, B.*, said : “ If the statute does not permit him to decide on the claim at all, how can he try whether it is a *bona fide* one or not ? ” : *Marsh v. Dewes* (17 Jur. 558).

Where in an action of trespass to land the defendant justified under a custom which the Court held to be void, it was *held* that no title to a hereditament came into question. “ The jurisdiction of the Court cannot be excluded by pretence of a custom which it has been so long and solemnly determined can have no valid existence ” : *Lloyd v. Jones* (17 L.J.C.P. 206).

Counsel cited *R. v. Burnaby* (2 Ld. Ray. 900), as showing that “ if the defendant had but a colour of title, the justices of the peace had no jurisdiction in the cause.” But *Denman, C.J.*, said he doubted if *Holt, C.J.*, had said that, and in any event his opinion was overruled by the other Judges in the case ; “ if it were so, a party might always escape a conviction by saying, ‘ I have a claim of right ’ ” : *Ex parte Higgins* (10 Jur. 838).

“ The action in the Court below was an action of trespass. The defendant gave notice of his intention to raise the question of the jurisdiction of the District Court, and further, to set up the defence that the soil and freehold alleged to have been trespassed upon was the soil and freehold of the defendant. The District Court Judge determined the plea, if I may so call it, of jurisdiction against the defendant, and went into the second question as to whether the soil trespassed upon was the property of the defendant, and determined that against him also. If that is not a determination of a question of title, I don’t know what is. I think the second objection, that no sufficient evidence of the

defendant's title was given in the Court below, is wholly irrelevant. In order to oust the jurisdiction it is only necessary to show that a question of title is *bona fide* raised, not that the claim is supported by sufficient evidence. The business of the District Court Judge is not with the evidence at all": *Hunt v. Hardcastle* (N.Z.L.R. 3 S.C. 21).

Motion by defendant to prohibit magistrate from hearing a case on the ground that a question of title was likely to arise. "It is not proved to my satisfaction that the title really is in dispute; but if it turns out at the hearing of the case by the magistrate that the title is in dispute, then it will be the magistrate's duty to stay his hand and not proceed with the case. This is not the class of case where the matter has been heard by a magistrate, and title has come in question. The case has not yet been before the magistrate. Before this Court could interfere at this stage it must be clearly proved that the title must come in question. It is not proved to my satisfaction that this case is in that position."—*Stout, C.J.*: *Manawatu Athletic Park Co., Ltd. v. Smith* (25 N.Z.L.R. 911: 8 Gaz. L.R. 419).

N. had prosecuted E. for stealing road dust from the applicant's land. E. commenced proceedings in the County Court against N. for false imprisonment. On the issue of the summons, N. obtained an order for a prohibition on the ground that he was advised that a question of his title to the land would come into question. N. applied for a rule to set aside the prohibition and for a writ of *procedendo*. The writ for a *procedendo* was made absolute. *Crouther, J.*: "On no conceivable view of the matter could title to land come in question here. . . . The charge was not of a trespass on the defendant's land, but of stealing his property. For this the plaintiff has brought an action of false imprisonment. I cannot see the remotest possibility of any question of title to land being brought in question." *Willes and Byles, JJ.*, concurred: *Eversfield v. Newman* (2 C.B.N.S. 418).

Where part of the defence set up in the County Court involved a question of title to land, *held* that the jurisdiction was ousted though the plaintiff did not dispute that part of the defence: *Tenniswood v. Pattison* (3 C.B. 243).

Applicant was prosecuted under the Inclosed Lands Protection Act (18 Vic. No. 27); he set up that the land was his, that it had been his father's and that the latter never sold it, and that he claimed as next of kin; prosecutor proved that three or four years before he had ousted applicant in an ejectionment (which was undefended, and applicant swore he had instructed a solicitor to defend). *Held*, that independently of statute and as a matter of common law, if a *bona fide* claim of title to land is made before a magistrate, he has no jurisdiction and must hold

his hand. But in order to oust the jurisdiction, the claim must be *bona fide*, and must have some foundation to support it. "The justices in this case had jurisdiction to inquire whether the claim of right was really *bona fide*, and whether it was made honestly and with any reasonable foundation, and if we saw that they had come to a decision demonstrably wrong, or to a conclusion which no reasonable men should have arrived at, we should grant a prohibition; but looking at the evidence in this case I am unable to say that they have."—*G. B. Simpson, J.* (*Cohen, J.* concurred): *Ex parte Grills* (17 W.N. 168).

The applicant was charged under sec. 1 of 18 Vic. No. 27, with entering certain enclosed lands without lawful excuse; he and other witnesses gave evidence that for many years there had been a road through the lands in question, and that he *bona fide* claimed a right to use the road which the prosecutor had fenced off. *Held*, that there was in fact a claim of right; the question whether reasonable grounds existed for such claim or not was not material, as there was nothing to show that the magistrates had found that the defendant had acted without *bona fides*. A prohibition was granted: *Ex parte Dorrington* (4 W.N. 62).

By an agreement in writing the defendant let certain premises to the plaintiff for a term of two years. The agreement contained a provision that the plaintiff should "have the chance to renew the lease for a further period of two years, should he choose to do so, and at a rental then to be fixed." A few days before the expiration of the term given by the agreement, a letter was written by the plaintiff's solicitor stating that the plaintiff required a renewal for another two years, but saying nothing about fixing the rent. It was not suggested that any agreement was ever come to about the rent, but the plaintiff remained in possession for about two months after the expiration of the term given by the agreement, when the defendant took proceedings to recover possession under sec. 175 The Magistrates' Courts Act 1893. The plaintiff set up at the hearing that he had a right to a renewal and to the possession of the land, and upon judgment against him, moved for a prohibition. A prohibition was refused—as the old lease had expired and there was no evidence that a new lease had been arranged, no question of title was involved and the magistrate had jurisdiction to make an order for the delivery of possession. "*If even a baseless claim had been bona fide made to the ownership of the land, the jurisdiction would have been ousted.*" . . . The relationship of landlord and tenant had ended, and the question arose whether under the section 'reasonable cause' was shown 'why possession' should not be given to the plaintiff. . . . If there had been any evidence that a new lease had been arranged,



or any evidence to show that the title to the land was not in the plaintiff, then no doubt the jurisdiction would have been ousted. As was said in *Becket v. Peacock* (11 N.Z.L.R. 441), *it is not the function of the magistrate to investigate and decide the merits of conflicting evidence on title.*—*Stout, C.J. : Allen v. Kenny* (22 N.Z.L.R. 671).

The assertion of title to a right of way involves a question of title to land within the meaning of the District Courts Act : *Ex parte McGregor* (2 N.S.W.R. 45).

A claim to a right of highway involves a question of “rights in future” within the meaning of the Small Debts Recovery Act : *Ex parte Wesley* (3 S.R. 264).

A claim of right to discharge drainage water into and have it carried away by an artificial ditch on the defendant’s land is a claim to an easement, and ousts the jurisdiction of the Resident Magistrates’ Court : *Reg. v. Carew* (N.Z.L.R. 2 S.C. 116).

An owner of land brought an action against another owner of land at a higher level, admitting the liability of his land to receive the natural drainage of the defendant’s land, but claiming for damage done by the defendant in concentrating the flow of water from other land into the same channel ; a prohibition was refused. “The distinction is between a question affecting the right to property and one only affecting the right to make a particular use of property.”—*Richmond, J. : Mathers v. Bradow* (N.Z.L.R. 4 S.C. 236).

The defendant for several years carried on mining operations with a puddling mill under a license from the Crown, discharging sludge upon adjacent Crown land. Such land was afterwards proclaimed as a reserve for a reservoir, and defendant received notice to stop the flow of sludge thereon. Upon non-compliance he was convicted by justices under sec. 15 of Waterworks Act, No. 288. On motion for a prohibition, it was *held* that defendant possessed no easement or permanent right to discharge sludge, and that no question of title arose which ousted the justices’ jurisdiction : *R. v. McIntyre* (5 W.W. & A.C.L. 25).

In an action for trespass to land, the defendant set up a customary right to enter the plaintiff’s land for the purpose of fishing there. *Held*, that this claim did not raise a question of title to a “hereditament” within the meaning of 9 & 10 Vict. c. 95, sec. 58 : *Lloyd v. Jones* (17 L.J.C.P. 206).

Action in District Court for trespass to land. Defendant put in a conveyance dated 1873 of land to him, and called a surveyor to prove that according to the description in that indenture defendant was entitled to 4 feet on plaintiff’s side of the fence. The Judge found that plaintiff had been in exclusive possession for 30 years ; that the fence

had stood that time and the position had not been disputed till within the last two years ; and, therefore, the question of title could not in this action be *bona fide* in dispute. Prohibition was granted as title to land was in question : *Ex parte Gane* (3 W.N. 137).

In an action for trespass to land brought in a Resident Magistrate's Court, defendants claimed to justify under a covenant in a deed of lease from them to the plaintiff reserving a right to them to occupy and cultivate certain defined portions of the land demised. It was proved that the defendants not having occupied and cultivated the land reserved for that purpose, the plaintiff sowed it down in grass, and that the defendants then fenced it in and cut the grass. The magistrate gave judgment for the amount claimed. On motion for a prohibition, it was *held* that the magistrate had no power to construe the covenant ; that the question of the right of entry on the land under the deed involved a question of title, and that the jurisdiction was therefore ousted : *In re Johnson v. Te Waka* (3 N.Z.J.R.N.S.S.C. 105).

Where title to land was *bona fide* in dispute in a District Court action, the Court had no jurisdiction and a prohibition issued : *Ex parte McCarthy* (14 S.C.R. 285).

“The terms of sec. 16 of the District Courts Act 1858 somewhat differ from those of the corresponding section (sec. 58) in the English County Courts Act, 9 & 10 Vic. c. 95. In the English Act the words are : ‘The Court shall not have cognisance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, &c., shall be in question.’ In the District Courts Act 1858 the words are : ‘in which the title to real estate, &c., shall be in question.’ The terms of either Act are confined to heritable property, but deprive the inferior Court of jurisdiction wherever a question of title to any interest in land is *bona fide* raised in the suit by either litigant, although the interest in dispute may be of the nature of personalty. The terms ‘hereditament’ in one Act and ‘real estate’ in the other, describe the subject of property and not the nature of the estate claimed. The case of *Chew v. Holroyd* (8 Ex. 249) is an authority for this construction of the English Act, and shows that where the right of possession is in question the jurisdiction of the County Court is ousted. I see no reason for a different construction of sec. 16 of the District Courts Act 1858. Proceedings under secs. 28 and 106 stand on a somewhat different footing.” —*Per Richmond, J.* : *Jones v. Ashton* (4 N.Z.J.R.S.C. 103).

N. executed in 1861 a voluntary settlement of certain property on his wife. Afterwards he leased part of the property by deed to Y. for a term unexpired. But the wife alone had received the rent and given receipts in her own name. She died in 1866, devising the property for



the benefit of her children, and after her death the trustees under her will had received one half-year's rent. These trustees sued Y. in the District Court for use and occupation. Y. pleaded that the Court had no jurisdiction, because title to land was *bona fide* in question, and that he held under a lease from N., and not otherwise. The Judge rejected evidence of the lease, and, on proof of the payment of rent to Mrs. N. and her trustees, ruled that title was not *bona fide* in question and found for plaintiffs. A prohibition was granted; the wife had in fact no title nor had her devisees or trustees: *Ex parte Yeomans* (8 S.C.R. 93).

A complaint was laid against defendant for disturbing a water-race. Defendant relied on his Crown grant of the land, and complainants on their miners' rights. A prohibition was granted—a *bona fide* question of title arose and ousted the jurisdiction: *R. v. Webster* (1 V.R.C.L. 82).

A Small Debts Court gave a verdict for municipal rates; a prohibition was sought on the ground that, as unpaid rates are a charge on the land, the jurisdiction was ousted because "rights in future" (see now s. 11 (1) of 1899 No. 13) might be bound. But it was *held* that the Court had jurisdiction, and a prohibition was refused: *Ex parte Backhouse* (3 S.C.R. 85).

Prohibition sought on the ground that the libel in a consistory Court stated an immemorial custom and prescription for the rector to receive from the parishioners a composition for the tithe of milk. This, it was urged, being a matter of common law cognisance, was improper to be discussed in the Ecclesiastical Court, and, as it appeared on the face of the libel, afforded good ground for prohibition. But, as the defendant had not in his plea denied the custom, the Court refused prohibition. They said that, as the subject matter was within the jurisdiction, a prohibition would not lie unless that Court were proceeding to *try* the question of custom, but in this case, as the custom was not denied, it could not be put in issue: *Dutens v. Robson* (1 H. Bl. 100). Cf. *Dunn v. Coates* (1 Atk. 288).

Ecclesiastical Courts have no jurisdiction to try a prescription; where they do proceed to do so, prohibition lies: *Byerley v. Windus* (5 B. & C. 1).

Plaintiffs sued defendant in an Ecclesiastical Court for not repairing a chancel, it being alleged in the libel that there was a custom that the rector (defendant) should repair. The defendant denied the custom, and the Court *held* it not proved, and awarded defendant his costs. A prohibition was sought by plaintiffs on the ground that the Court could not try a custom. But prohibition denied; the reason why a spiritual Court cannot try a custom is because they have different

notions from the common law as to what creates a custom ; but in this case the reason failed because there was no custom allowed by the Ecclesiastical Court. “And the plaintiffs having grounded their libel upon a custom, which was well grounded, if the custom had not been denied (for libels there may be upon customs) ; but the custom being denied and found no custom, it is not reason to prohibit the Court in executing the sentence against the plaintiffs. For the design of the motion for a prohibition is only to excuse the plaintiffs from costs. And there is no reason but that they ought to pay them, since it appears that they have vexed the defendant without cause” : *Churchwardens of Market Bosworth v. Rector of Market Bosworth* (1 Ld. Ray. 435).

A prohibition was granted to restrain the spiritual Court from trying the question of the validity of an induction : *Holt's Case* (1 Bulst. 179).

A prohibition cannot be granted to a Spiritual Court merely because it has no power to try one of the facts stated in the pleadings, unless that fact is denied : *Jones v. Stone* (1 Ld. Ray. 578).

The plaintiff sued in the County Court to recover from the defendant two parcels of land claimed by the plaintiff under a will, as to one parcel in freehold, and as to the other for a term. The defendant disputed the validity of the will. *Held*, that as to the leasehold the probate was conclusive, but, as to the freehold, title to land came into question and the jurisdiction of the County Court was ousted : *Kerkin v. Kerkin* (3 E. & B. 399).

A tonnage rate under 32 Geo. III. c. 74, is a “toll” within 9 & 10 Viet. c. 95, sec. 58, and the County Court cannot determine a suit in which the title to such rates is in question : *R. v. Everett* (1 E. & B. 273).

By 9 & 10 Viet. c. 95, sec. 58, the County Court's jurisdiction is ousted in “any action in which the title . . . to any toll . . . shall be in question. The plaintiff sued a railway company for refusal to carry his waggons containing coal. The refusal was based on a claim by the company to charge for the passing over their line and bringing back empty the waggons in question. A prohibition was moved for on the ground that the defendant's title to a toll came in question. *Creswell, J.* : “This is not a toll ; it is a sum payable for the locomotive power.” *Williams, J.* : “How does the title to any toll come in question here ?” *Jervis, C.J.* : “To entitle the defendants to a prohibition, there must be a *bona fide* dispute as to their title to toll. I think that did not, and could not come in question here.” Rule refused : *Hunt v. Great Northern Railway Co.* (10 C.B. 900).

The County Court has no jurisdiction to try a cause involving the question of title to the office of parish clerk ; that office being a heredita-

ment within the meaning of 9 & 10 Vict. c. 95, sec. 58 : *Stephenson v. Raine* (2 E. & B. 744).

A person holding the office of Examiner of Weights and Measures was sued in the County Court, and the plaintiff had a verdict. A prohibition was now sought on the ground that the office was a "franchise," within 9 & 10 Vict. c. 95, and that the Judge had therefore no jurisdiction—but it was refused; the title to the appointment of examiner was not in question, and the defendant was taken throughout to be duly appointed : *Stevenson v. Stickle* (13 Jur. 1103).

A claim of a custom for the occupiers of wharves on a navigable river to overlap the adjoining wharves with their vessels, when being loaded or unloaded, does not raise any question of title to an incorporeal hereditament or a franchise, so as to exclude the jurisdiction of the County Court under sec. 58 of 9 & 10 Vict. c. 95 : *Davis v. Walton* (8 Ex. 153).

Prohibition to restrain the Ecclesiastical Court from trying the bounds of parishes : *Brown v. Palfrey* (3 Keb. 286). Cf. *Stransham v. Cullington* (Cro. Eliz. 228).

A parson libelled defendant in the Spiritual Court of York for having cut elms in the churchyard. Upon suggestion that they grew on defendant's freehold, prohibition was granted—the Spiritual Court has no jurisdiction where the right of freehold comes in question : *Hilliard v. Jefferson* (1 Ld. Ray. 212).

Applicant was sued in a Consistorial Court for breaking open a chest in the church and taking the title deeds to the advowson out of it. A prohibition was granted; the subject of the suit was title deeds, for taking which only trespass or trover could be maintained in the temporal Courts : *Gardner v. Parker* (4 T.R. 351).

Prohibition lies if the Ecclesiastical Court will question the institution after induction : *Hutton's Case* (Hob. 15).

Formerly the County Court could not try a question of freehold, even though merely incidental : *Cannon v. Smallwood* (3 Lev. 203).

Proceedings were taken in the Spiritual Court for simony. A prohibition was refused. "And although it were said that in the Spiritual Court they ought not to have intermeddled to divest the freehold which is in the incumbent after the induction, true it is they should not meddle to alter the freehold, but they meddled only with his manner of obtaining the presentment, which by consequence divested the freehold from him : " *Baker v. Rogers* (Cro. Eliz. 788).

*Held*, that though Act No. 399, sec. 23, provides that no claim of right or title shall oust the jurisdiction of justices upon an information for destroying fences under No. 233, sec. 71, yet it may be shown that

defendant was removing a fence which obstructed his right of passage : *R. v. Guthridge ; Ex parte Campbell* (4 V.L.R.C.L. 77). [See No. 1079, sec. 194.]

Where the Spiritual Court hath cognisance of the principal matter they shall determine that which is incident to it, and therefore in a suit for tithes they may try the title under which they are claimed : *Robert's Case* (Cro. Jac. 269).

If the right of a parson to a way be undoubted and the way is stopped so that he cannot take his tithes, he may sue in the Spiritual Courts, but if the suit be to determine whether or not he shall have a way, he must sue in the common law Courts, and a prohibition will be granted to restrain such a suit in the Spiritual Court : *Denton v. Stocke* (1 Bulst. 67).

Complaint under sec. 10 of 19 Vic. No. 24, for detention of logs. Defendant claimed that the land on which the logs were was his. "It is argued that if on such enquiry it becomes necessary incidentally to determine a question of title to land with the object of coming to a conclusion as to the title to the goods, then the magistrate has the power and in fact is bound to decide such question of title to land for the purpose of ascertaining the title to the goods, and for that purpose only. . . Now, in such a case as this, where the ownership of goods can only be decided by an enquiry into the title to certain land, if the magistrate were to decline to enter upon such an enquiry, he would be refusing to exercise a jurisdiction which is conferred upon him by the words of sec. 10, and although I see that very great difficulties and inconvenience may arise, by throwing upon justices the grave responsibility of determining so intricate a question as title to land, nevertheless I feel constrained to hold that, by the words of the section, they must have this power."—*Darley, C.J. : Ex parte McSwan* (9 N.S.W.R. 417).

Applicant was summoned before justices for unlawfully taking fish in a private fishery ; before the justices he asserted a public right of fishery, and called upon them to require the prosecutor to produce his title deeds. The justices, being satisfied otherwise of prosecutor's title, convicted, and prohibition was sought on the ground that a claim of right was involved, but refused ; the Act 7 & 8 Geo. IV. c. 29 gave the justices power to say whether the fish were taken unlawfully and the statute clearly gave them the right to try the question of the prosecutor's title : *Ex parte Higgins* (10 Jur. 838).

R. and J. were sued in a magistrate's Court by M., for trespass to land of which M. was lessee, and removing gates and other property of the value of £6. R. and J. stated in defence that R. agreed with M. to take a sublease of the premises for the whole of M.'s unexpired term, and that R. had entered under this agreement and erected slaughter-

yards and temporarily removed the gates, and that he had a right to do so under the agreement. R. had paid no rent. M. denied the agreement and alleged that he merely allowed R. to occupy the premises without specifying any time and had himself supplied the chief part of the material for the slaughter-yards, and that he and R. had settled accounts, and R. thereupon abandoned the premises. It was objected that there was no jurisdiction as title to land was in dispute: The Magistrates' Courts Act 1893, sec. 34. The magistrate granted a nonsuit as to R., but gave judgment against J. for the value of the goods and trespass. In giving judgment he said that, without deciding the question of title, he would exercise his power under sec. 97 and *decide on the ground of "equity and good conscience."* On motion for prohibition, Williams, J., said that the real question was whether sec. 34 applied. "Apart . . . from sec. 34, the fact of the question as to title to land being raised *bona fide* would have been sufficient to oust the jurisdiction of the magistrate. And if his jurisdiction was thus ousted, it seems to me impossible to contend that the provision of sec. 97, which allows the magistrate to decide according to equity and good conscience, can have any application. If the magistrate has jurisdiction to decide upon the case, then he can decide upon it according to equity and good conscience under the provisions of sec. 97. If he has no jurisdiction to decide upon the case, he can no more decide upon the ground of equity and good conscience than he can decide in any other way. *If, therefore, sec. 34 does not apply the magistrate had no jurisdiction; if sec. 34 does apply he had jurisdiction to decide, and in that case he could decide upon the ground of equity and good conscience if he thought proper to do so.*" His Honour then *held* that sec. 34 applied to the case. "Then, in the course of the proceedings, if a question of title is raised, sec. 34 seems to me to give the magistrate jurisdiction to decide upon the claim before him, even though it becomes necessary for him to determine that question of title in order to decide upon the claim. The section, however, expressly says that this incidental determination is limited to the particular case, and that 'the judgment of the Court thereon shall not be evidence of the title between the parties or their privies in any other proceeding in that or in any other Court.' Unless such a construction is placed upon sec. 34 it seems impossible to give a satisfactory meaning to it, or to say what cases are within it. The observations of the author of Davis's County Court Practice (8th ed., 25), as to the meaning and intention of the corresponding English section (19 & 20 Vic. c. 108) are perfectly sound. I think, therefore, the motion must be dismissed with costs": *Tait v. McCallum* (13 N.Z.L.R. 232). And see *Kilminster v. Monaghan* (21 N.Z.L.R. 522).



A bailiff seized an interest in a gold-mining claim under a distress to satisfy a judgment given in a Resident Magistrate's Court. On an interpleader issue, it was contended that the magistrate's jurisdiction was ousted as the question of title was involved (sec. 19). A prohibition was refused. The gold-mining lease was a chattel, which the bailiff was entitled to seize under sec. 65. Being a chattel, the magistrate's jurisdiction was not ousted by sec. 19 : *Campion v. Turton* (N.Z.L.R. 3 S.C. 337).

By a local Act for rebuilding a church, trustees were empowered to levy rates on all houses in the parish, one-half to be paid by the landlord and the other half by the tenant, the tenants to pay the whole rate in the first instance and deduct a moiety out of the rent, and that every landlord should allow of such deduction accordingly, *notwithstanding any agreement to the contrary*. After the Act, a lease was granted to a tenant, who covenanted to pay all parliamentary and other taxes and rates. The tenant paid the full rate and sued the landlord for his moiety, who refused to pay on the ground that the Act only applied to agreements in existence at the time. A prohibition was refused. No question was raised as to the title to any corporeal or incorporeal hereditaments (sec. 58 of 9 & 10 Vic. c. 95) and the County Court had jurisdiction : *In re Knight* (1 Ex. 802).

Plaintiff sued in a County Court to recover damages for injury to his premises by the negligence of defendant, whereby canal water was suffered to overflow. The County Court Judge found for the plaintiff, holding that the title to the canal was not material, as there was an obligation on the defendants, apart from title, to protect adjoining owners from injury. A prohibition was refused—"Before a prohibition can go, it must be shown that title to land came in question, and that such title was a material ingredient in the decision of the Court ; but that is not made out in this case, for it seems to me that the reason of the Judge's decision was the liability of the Company to repair these banks wherever the title may be, and, consequently, no question of title arose."—*Lord Campbell, C.J. : Morton v. Grand Junction Canal Co.* (6 W.R. 543).

Plaintiff sued for a "paving rate" in the County Court. A prohibition was set aside—the County Court had jurisdiction as a paving rate is not an "incorporeal hereditament" (sec. 58 County Courts Act), so as to oust the jurisdiction of that Court : *Baddeley v. Denton* (7 D. & L. 210).

A prohibition was granted to restrain the council at York from holding pleas in replevin and avowries : *Baker v. Dickenson* (1 Bulst. 110.)

In an action for rent and double value, title to land does not come in question where the defendant has admitted himself to be tenant to the plaintiff when the rent accrued, and when the holding over commenced : *Wickham v. Lee* (12 Q.B. 521).

The plaintiff and defendant entered into negotiations for the letting by the plaintiff to the defendant of a cottage, the property in which was claimed by the plaintiff, but no agreement was come to. The defendant then took forcible possession of the cottage, and on being sued in the County Court for rent, set up title in the lord of the manor. *Held*, that as there was no evidence of the creation of a tenancy, the title was in question, and a prohibition went : *Marwood v. Waters* (13 C.B. 820).

Where a defendant in an action for use and occupation offers to show that his landlord's title has expired, title to land comes *bona fide* into question, and the jurisdiction of the County Court is ousted : *Moutney v. Collier* (1 E. & B. 630).

"Mr. *Hawkins* has urged that the defendant ought to set out the title which he alleges will come in question upon the trial, so that the Court may see that he really has title. That would make the question depend rather upon the issue which remains to be tried between the parties, than on whether the title to land is *bona fide* in dispute. The *bona fides* alluded to in some of the cases is as to whether the defendant's own acts do not show that he has no shadow of title or pretence for setting up the question of title ; not as to whether the title is not one which can be controverted. It seems to me that, taking the affidavits on both sides, the question in dispute is one of title or none at all."—*Wightman, J. : Sewell v. Jones* (1 L.M. & P. 525).

On the trial of a plaint for a trespass committed by breaking the doors of certain rooms in a cottage of the plaintiff, the plaintiff's case was that he had let the defendant a portion only of the cottage, and had reserved to himself the rooms in which the trespass was committed. The defendant's case was that the plaintiff had let him the whole of the cottage. A prohibition was granted—title to a corporeal hereditament (sec. 58 of 9 & 10 Vic. c. 95) was in issue, and the County Court had therefore no jurisdiction : *Chew v. Holroyd* (8 Ex. 249).

B. was let into possession of premises as tenant to E., and paid him rent. S. claiming title, B. gave up possession to him. E. sued B. in the County Court for arrears of rent and possession of the premises. B. set up S.'s title, and the County Court Judge declined jurisdiction on the ground that title to land was in question. *Williams, J. :* "The Judge declined to hear and decide the case. He appears to have thought that a question of title arose, and that he had no jurisdiction as soon as

he was satisfied that a *bona fide* claim to the property was set up by a third party. He considered that a change of possession was enough to make him hold his hand. I am of opinion, however, that he ought to have gone further and inquired whether the defendant left the premises by compulsion of S., or voluntarily. If he found that the defendant was *turned out*, then the question of title would have arisen, and the case would have come to a point at which the jurisdiction of the County Court ceased and the Judge ought not to have heard any more. If on the other hand he found that the tenant went out *voluntarily* . . . no question of title *could* arise, because by the ordinary and well known rule of law, both the tenant and S. would be estopped from disputing the landlord's title." *Crowder, J.* : "I am of the same opinion. The Judge of the County Court seems to have proceeded on the notion that a *bona fide* claim of title was sufficient to oust his jurisdiction. That is clearly a mistake. The language of the 58th section of the 9 & 10 Vict. c. 95 is 'where the title to land is in question'": *Emery v. Barnett* (4 C.B.N.S. 423).

11. *Encroachment by inferior Court upon sphere of jurisdiction of another Court.*

Plaintiff brought trespass in the Exchequer against defendants for digging in his soil and close, and not guilty was pleaded. Defendant then sought an injunction in the Chancery of Dover within the Cinque Ports, setting up a custom, and plaintiff was decreed not to proceed and to pay costs, upon which he prayed a prohibition; which was granted—"it is not in the power of any inferior Court to stay proceedings in a cause that is first attached here": *Williams v. Lister* (Hardres 475).

By consent a decree was made in the Matrimonial Causes jurisdiction of the Supreme Court of New South Wales for judicial separation. No order was made or asked for with regard to the maintenance of a child with which the wife was then pregnant. After the birth of the child an order was made by a magistrate under the Deserted Wives and Children Act 1901, for maintenance of the child. *Held* (1) that the magistrate had no power to make an order the effect of which was to vary an order of the Supreme Court which the Supreme Court had itself statutory power to vary; (2) that the magistrate had wrongfully rejected a plea of *res judicata* setting up the decree of the Supreme Court; and (3) that on either ground the applicant was entitled to a prohibition: *Brown v. Brown* (3 C.L.R. 373; 13 A.L.R. 389).

The Debtors Act (32 & 33 Vic. c. 62) empowers inferior Courts to

rescind or vary orders for payment of money ; but that does not empower such Courts to rescind or vary an order of a superior Court on a judgment of the latter. So, where the Common Pleas ordered a judgment to be paid by instalments of £1 per month and the Mayor's Court, on a summons under the Act, directed payment at £2 per month, *held* that a prohibition lay against such order : *Washer v. Elliott* (1 C.P.D. 169).

Magistrates gave judgment for a plaintiff in the Small Debts Court who sued the defendant upon a judgment of the District Court. A prohibition was granted—the District Courts Act provides special remedies for enforcing that Court's judgments and any protection given in that Act to judgment debtors would be lost if actions could be brought on its judgments in other Courts. The decision of the Small Debts Court was not merely a wrong decision in law, but an excess of jurisdiction : *Ex parte Weekly* (6 S.R. 306). But see *Phillips v. Bennett* (0 S.A.L.R. 75).

The County Court had, before the passing of 19 & 20 Vict. c. 108, sec. 27, jurisdiction to entertain an action on a judgment of a superior Court : *Winsor v. Dumford* (18 L.J.Q.B. 14).

If it were impossible for the County Court to try such an issue by proper and legal evidence, it would have no jurisdiction : *Ibid.*

A debtor was, after several adjournments, adjudicated bankrupt by the Supreme Court on 4th January. On 21st December, after the initiation of the proceedings in the Supreme Court, the debtor filed in the District Court under secs. 22 and 23 of the Debtors and Creditors Act, 1876, a declaration of insolvency. Upon the debtor notifying his intention to apply for a certificate of discharge in the District Court, the petitioning creditor in the Supreme Court adjudication applied for a prohibition to restrain further proceedings in the District Court. Prohibition was granted ; the filing of the declaration in the District Court could have no effect either on the property or status of the debtor, in that, by virtue of the doctrine of relation back, the adjudication in the Supreme Court of 4th January, made the debtor a bankrupt as from the date of the committing of the act of bankruptcy : *Re Mackay* (2 N.Z.J.R.N.S. 231).

The official assignee in bankruptcy of B. sued the plaintiff in a Magistrate's Court to recover £143 from her on the ground that it had been paid to the latter by the bankrupt or retained by him with her consent under such circumstances that it amounted to a fraudulent preference. Upon judgment for the plaintiff, a prohibition was sought on the ground that sec. 12 Bankruptcy Act 1892 gave exclusive jurisdiction to the Bankruptcy Court. It was *held* that there was nothing

in the Bankruptcy Act giving that Court exclusive jurisdiction, and that the magistrate had jurisdiction : *Hudson v. Wardell* (15 N.Z.L.R. 287).

*Held.* that the refusal by a bishop to issue letters of request did not constitute *res judicata*, and did not prevent the Archbishop from issuing a commission under 3 & 4 Vict. c. 86 : *Ex parte Denison* (4 E. & B. 292).

The plaintiff in the Spiritual Court libelled for jactitation of marriage. A prohibition was granted on the ground that he had already been convicted of bigamy for marrying the defendant : *Boyle v. Boyle* (3 Mod. 164).

A resident magistrate had given judgment for a plaintiff, and an appeal had been dismissed, the Judge on appeal stating that evidence had been wrongly rejected, but that there was no power to order a rehearing. After the dismissal of the appeal, the defendant applied to the resident magistrate for a rehearing, and the magistrate granted the application. Application was now made for a prohibition to stay proceedings in the matter of the rehearing, on the ground that the magistrate had no power to grant the rehearing. *Williams, J.*, said : " The question turns on the construction of the 99th and 100th sections of the Resident Magistrates Act 1867. It seems to me that the discretion given by sec. 99 to the magistrate to grant a rehearing is taken away in cases where there has been an appeal to the Supreme Court. . . . It is easy to see that, in whatever way the statute is construed, inconvenience and hardship may result in certain cases, and in this particular case before the Court I have little doubt the defendant has suffered . . . I think that the construction I have placed upon the Act—viz., that it makes the decision of this Court in all cases final—will lead to fewer evil consequences than the construction contended for by the defendant. I think, therefore, the rule should be made absolute to prohibit a rehearing " : *In re Caversham Road Board v. Kennedy* (2 J.R.N.S. 173).

The Mayor's Court found a verdict for plaintiff for £18 11s. 1d., with leave to defendants to move to enter a nonsuit or a verdict for them. The rule for a nonsuit was discharged in the Common Pleas, but while the rule was pending, the defendants obtained a rule *nisi* for a new trial in the Mayor's Court on the ground of surprise and fresh evidence newly come to their knowledge. A prohibition was sought to restrain the rehearing, but was refused—there is nothing in the Act (20 & 21 Vic. c. 157) to interfere with the ordinary jurisdiction of the Mayor's Court, either before or after the decision of the Common Pleas upon the motion to them : *Lebeau v. The General Steam Navigation Co.* (L.R. 8 C.P. 129).

A County Court Judge granted a new trial in an action tried by



another County Court ; the latter Court had tried the action under an order for a new trial made by a Divisional Court. A prohibition was granted—the County Court Judge had no power to order such new trial : *Cooke v. Smith* (12 T.L.R. 629).

Applicant was convicted at Hay of selling liquor without a license. Hay was within a licensing district where there was a licensing Court duly constituted under the Licensing Act 1882, and the Court at which the applicant was convicted was not such a Licensing Court. A prohibition was granted—the Court which heard the case had no jurisdiction : *Ex parte Dunn* (Tarl. T.R. 94).

A. sued B. for wages in the Petty Sessions Court and, after evidence given on both sides, the bench failed to agree, and “no order made” was written on the face of the depositions. Thereafter A. again sued B. for the same wages before another bench. Objection was made that the bench had no jurisdiction to hear the case, as it had been previously decided ; but as no certificate had been given by the first bench to B., the Court *held* that A. was again entitled to sue for the wages and refused a prohibition : *Nixon v. Forbes* (S.M.H., 13th July, 1858).

R. sued F. before Justices for £8 for work and labour ; the case was dismissed and the justices gave F. a certificate under No. 267, sec. 107. R. then sued F. in the County Court, and F. produced the certificate as a bar to the action. The County Court Judge gave a verdict for the plaintiff, and, on motion for a prohibition, *Stawell*, C.J. : “The terms of this Act are very different from those of 9 Geo. IV. That Act barred proceedings, civil or criminal. We think that sec. 107 of the later Act only prevents a second proceeding before justices—not a proceeding in any Court of jurisdiction superior to justices in Petty Sessions” : *R. v. Skinner* (4 W.W. & A. (L.) 39). [But see No. 1105, sec. 77 (17).]

Applicant was a solicitor ; he had done certain work for a client and been paid his fee ; thereafter the client brought an action in the Court of Petty Sessions to recover what he alleged to be an overcharge in the settlement of applicant’s costs and obtained a verdict. A rule *nisi* for a common law prohibition was refused. *Martin*, C.J., thought it should be granted, as the effect was to take away from the proper officer the power to tax applicant’s costs ; but *Faucett* and *Windeyer*, JJ., *held* that the action was clearly within the jurisdiction of the Court of Petty Sessions : *Ex parte Thompson* (1 W.N. 106).

If the Government issues a Commission having for its obvious purpose interference with the course of justice, prohibition will lie to restrain the Commission from proceeding with the inquiry : *Cock v. Attorney-General* (28 N.Z.L.R. 405 ; 11 Gaz. L.R. 543). And see *Clough v. Leahy* (2 C.L.R. 139 ; 11 A.L.R. 32 ; 4 S.R. 401 ; 21 W.N. 129).

12. *Wrongfully entertaining appeal, &c.*

Sec. 2 of the Native Land Laws Amendment Act 1890 provided that the Native Land Court should have the same power as the Supreme Court to grant probate of the wills of natives, and that such probates should have the same force and effect as if granted by the Supreme Court. The Court declined to grant probate of a will of a native, but subsequently ordered a rehearing and granted probate. A prohibition was sought to prevent this order made on the rehearing from being acted upon, on the ground that the Court had no jurisdiction to grant a rehearing. But the application was refused—the general power of the Native Land Court to grant a rehearing conferred by sec. 75 of the Native Land Court Act 1886, and sec. 24 of the Amendment Act of 1888, extended to causes disposed of under the new jurisdiction; where a new jurisdiction is given to a well known Court, with well-known modes of procedure, it must, unless the contrary be expressed or plainly implied, be given to that Court to be exercised according to its general inherent powers of dealing with the matters already within its cognisance: *Mere Ngareta v. Davy* (13 N.Z.L.R. 533). But see *Barker v. Edger* (14 N.Z.L.R. 669).

Where on a complaint under the Deserted Wives and Children Act, 1901 No. 17, sec. 4, the magistrate endorsed the papers “no order made,” held that the Court of Quarter Sessions had no jurisdiction to entertain an appeal and a prohibition was granted: *Ex parte Clunes* (24 W.N. 198).

A right of appeal to General Sessions was given in cases of “conviction.” Justices had made an order directing the forfeiture of certain liquor seized, on the ground that it was being sold without a license (sec. 67, Wines, Beer and Spirit Sale Statute, 1864 No. 227): on an appeal to General Sessions being instituted a prohibition was granted—the adjudication in this case was not a conviction; no penal consequences followed the adjudication; no penalty or fine was imposed on anyone: *R. v. Pohlman* (5 A.J.R. 22).

The District Court proceeded with an appeal from a Commissioner of Crown Lands under sec. 3, The Mining Act Amendment Act 1899. There was no appeal from the Commissioner. A prohibition was granted: *In re Beattie* (21 N.Z.L.R. 98).

A warden sat with assessors and an appeal was laid from their decision to the Court of Mines; a prohibition was granted to the Court of Mines—there is no appeal under the Mining Statute 1865, from the finding of the assessors on the facts; the only appeal is from a mistake of law and the only remedy for a mis-finding by assessors is a new trial:

*R. v. Brewer* (4 W.W. & A.C.L. 124). Cf. *Power v. Macdermott* (2 W. & W.C.L. 241).

A valuation list was made by the overseers of the parish of St. George, Hanover Square, and approved by the assessment committee of St. George's Union. The London County Council appealed against this valuation to the London Quarter Sessions, exercising the jurisdiction formerly exercised by the assessment sessions, on the ground that the totals of the rateable and gross values in the parish were too low. The appeal was entered in due time to be heard at the February Sessions, 1891, but owing to the press of business in the Court, and through no default of the parties, it was not heard before the 31st March of that year. After that date the assessment committee applied for a prohibition, and it was granted on the ground that the appeal was not in reality an appeal against totals, but was an appeal against the value of hereditaments, which would not lie except from a decision of justices in special sessions: *R. v. London J.J. & L.C.C.* ([1893] 2 Q.B. 476).

Under 38 & 39 Vic. c. 55, sec. 150, notice was given by an urban authority to the owner of premises fronting a street to pave part of it and, on his default, the authority executed the work and their surveyor gave him notice of apportionment of the expenses for which the owner was liable, and demand was made upon him for the amount. Under sec. 268, he, deeming himself aggrieved by the "decision" of the authority, addressed a memorial by way of appeal to the Local Government Board, stating the grounds of his complaint. A prohibition was sought against the Local Government Board, but refused. The Board had jurisdiction to entertain the appeal, inasmuch as the local authority had given a "decision" to charge the expenses against the owner: *R. v. Local Government Board* (10 Q.B.D. 309).

### 13. *Miscellaneous.*

The Act 16 Geo. III. c. 5 provided that where certain captured ships were condemned and an appeal was lodged against the condemnation, execution should not be suspended in case the parties appellate gave sufficient security to restore the ship or the full value thereof to the appellants in case the sentence should be reversed. A proceeding being taken to enforce payment of a security, a prohibition was sought on the ground that the security was for a larger sum than the Act allowed, and was therefore made without authority. *Lord Loughborough* said that the ground that the Court was "using process which it has no authority to enforce" is a good ground for prohibition, on a maxim well established, "that these Courts of special jurisdiction

cannot assume to themselves the authority of Courts of record, and bind the estates of the subjects of the realm." But, in the result, it was *held* that the Court was not tied down to any definite measure of value to be given in lieu of ship and cargo : *Brymer v. Atkins* (1 H. Bl. 192-194).

A County Court entertained an action for damage sustained through a ship running into a pier. A prohibition was granted—that Court could not entertain such a suit : *The Normandy* ([1904] P. 187).

The master of a ship cannot sue in Admiralty for wages on a contract made on shore. Prohibition granted before judgment : *Clay v. Snelgrave* (1 Ld. Ray. 576).

By 32 & 33 Vic. c. 51, sec. 2, it is enacted that the County Court shall have Admiralty jurisdiction as to any claim arising out of any agreement made in relation to the use or hire of any ship, where the amount does not exceed £300. A suit was instituted in the County Court in respect of a charter party, but a prohibition was granted : the intention of the Act was only to give the County Court jurisdiction in cases in which the High Court of Admiralty had jurisdiction, and, as the High Court of Admiralty had no jurisdiction in such matters, neither had the County Court : *Simpson v. Blues* (L.R. 7 C.P. 290).

A County Court having Admiralty jurisdiction under 31 & 32 Vic. c. 71, and 32 & 33 Vic. c. 51, assumed to exercise jurisdiction in a case of collision between two barges propelled by oars. A prohibition was granted—the High Court of Admiralty has no jurisdiction in respect of such vessels, and the County Court has not a wider jurisdiction than the High Court of Admiralty : *Everard v. Kendall* (L.R. 5 C.P. 428).

An apprentice was convicted for absenting himself from his master's employ ; his indenture of apprenticeship was not signed by his father. A prohibition was granted—"if the son is not under 21 the Act of Parliament (Master and Apprentice Statute, 1864 No. 193, secs. 6, 17) does not apply ; if he is under 21, the signature of the father to the indentures is necessary. Either way, therefore, the justices had no jurisdiction."—*Stawell, C.J.* : *R. v. Templeton* ; *Ex parte Macpherson* (3 A.J.R. 106). [See now No. 1117, secs. 10, 17.]

*Held* by the Court of Appeal that upon a judgment summons taken out under sec. 5 of the Debtors Act 1869, there is no jurisdiction to make an order that the debt be paid by instalments, and that the debtor be committed to prison in default of payment of any of the instalments : *R. v. Brompton County Court J.* (18 Q.B.D. 213). This law, as here laid down, was approved by the House of Lords, but the actual decision



was reversed on a different view of the facts : *Stonor v. Fowle* (13 A.C. 20). Cf. *Horsnail v. Bruce* (L.R. 8 C.P. 378).

*Held*, on motion for a prohibition that the Small Debts Court has jurisdiction to entertain actions for debt on calls, and to determine incidental questions arising thereon—*e.g.*, whether defendant had, at the time the call was made, ceased to be a member of the company. Small Debts Act 1867, sec. 2 : *Great Freehold Mining Estate, Ltd. v. Garde* (4 Q.L.J. 9).

By an Act of Parliament a magistrate was empowered to determine the compensation payable to persons who had successfully tendered for leases of land held by the Public Trustee, the contracts for such leases being rescinded by the Act. *Held*, that the magistrate had jurisdiction to award compensation for items which could not have been considered in an action at law or a suit in equity for rescission of a contract to grant a lease : *Rangitaniwha v. Public Trustee* (10 N.Z. Gaz. L.R. 227).

A magistrate made an order directing a defendant under the Destitute Persons Act 1894, sec. 24, to pay certain moneys to his wife for maintenance of herself and children. The order was filed in the Supreme Court in pursuance of that section. The defendant did not pay, but subsequently sold and transferred land of his to the plaintiff ; thereafter the magistrate issued a warrant directing the sale of the land ; this warrant was made without notice to the plaintiff. *Stout*, C.J., *held* that a person purchasing *bona fide* for value without notice from the registered proprietor under the Land Transfer Act 1885, is not affected by a charge on the land created by the filing in the Supreme Court under sec. 24 the Destitute Persons Act 1894, previously to the purchase, of a maintenance order made under that Act against the registered proprietor. “What is being done is a proceeding under an order of the Court made by a judicial officer in his discretion, and made without foundation. This being so, prohibition is, in my opinion, the proper remedy.” This decision was affirmed on appeal by *Denniston, Conolly and Cooper, JJ.* : *Bishop v. Rowe* (23 N.Z.L.R. 66).

A. assigned by bill of sale chattels to N., which N., sold to K. who, not getting possession of them, summoned A. under Act No. 265, sec. 32, and obtained an order from justices for delivery. A prohibition was sought on the ground that the section gave jurisdiction only between assignor and assignee, and not as between assignor and assignee's assignee. The Court *held* that the jurisdiction did exist and discharged the rule : *R. v. Barnard* (4 W.W. & A.C.L. 249). [See No. 1105, sec. 59 (3).]

A friendly society enrolled its rules under 10 Geo. IV. c. 57, and afterwards framed new rules which were never enrolled or certified.



*Held*, that the society was a subsisting society under 18 & 19 Vict. c. 63, sec. 2, and that under sec. 41, the County Court had jurisdiction to entertain an action by a member for sick pay : *Mendith v. Whittingham* (1 C.B.N.S. 216).

Sec. 15 District Courts Act enables that Court to settle disputes arising in friendly societies. Where a rule of a friendly society provided that on winding up the same consequences should follow as on the winding up of a company, it was *held* that the liquidator could sue under the Act for contributions due from a shareholder : *Ex parte Mansfield* (20 N.S.W.R. 75).

Prohibition granted to restrain the Industrial Arbitration Court from making an award or enforcing an agreement not relating to an industrial matter : *Clancy v. Butchers' Shop Employees' Union* (1 C.L.R. 181).

The Industrial Arbitration Court made an order directing preference to unionists, and further directing that members of the employers' union requiring labour should notify the secretary of the employees' union. Prohibition granted to restrain the Court from proceeding on so much of the order as directed notice : *Trolly, Draymen & Carters' Union v. Master Carriers' Association* (2 C.L.R. 509 : 5 S.R. 77).

The Industrial Arbitration Court was restrained from making the terms of an industrial agreement a common rule : *Master Retailers' Association v. Shop Assistants' Union* (2 C.L.R. 94).

Prohibition granted to restrain the Industrial Arbitration Court from enforcing an order by attachment. The Arbitration Court, like other inferior Courts, cannot commit for contempts not *in facie curiæ* : *Master Undertakers' Association v. Crockett* (5 C.L.R. 389).

A magistrate had given judgment for Dawson against Burke ; on warrant issued, the bailiff seized certain mining property—a dam, water races and tail races. The plaintiff claimed the property as assignee and the bailiff interpleaded. On the hearing the magistrate found that the assignment was really a mortgage and ordered a sale by the bailiff and that accounts be submitted to him for adjustment. It was *held*, on motion for a prohibition, that the bailiff had no right under sec. 65 Resident Magistrates Act 1867 to seize what the magistrate found to be an equity of redemption. “ It seems to me clear that, if in an interpleader proceeding under sec. 72 of the Magistrates Act the magistrate found as a fact that what the bailiff has purported to seize is an equity of redemption, the only finding that the magistrate under such circumstances had jurisdiction to make is that the bailiff had no right to seize and must withdraw.”—*Per Williams, J.* A prohibition was therefore granted : *John v. Dalgliesh* (41 N.Z.L.R. 167).

A. obtained judgment in the County Court against B. and B.'s wife in 1880 for £26 18s., which was ordered to be paid in April, 1880. In June, 1886, this amount was paid into Court. The defendant B. died and in July, 1886, A. obtained an order amending the judgment by substituting for his name that of his administratrix, and ordering payment of £6 10s. interest at 4 per cent. from April, 1880, to June, 1886, with costs of the application. A prohibition was granted; a County Court judgment does not carry interest under 1 & 2 Vic. c. 110, sec. 17: *R. v. County Court Judge of Essex* (18 Q.B.D. 704).

A Licensing Court granted a renewal application subject to the condition that the licensee should within three months transfer the license to some approved person. A prohibition was granted; there was no jurisdiction to annex this condition to the grant: *Whittle v. Bishop* (13 N.Z.L.R. 670).

*Held*, that in order that justices may have jurisdiction under sec. 10 of 20 Vic. No. 28 (Cf. 25 Vic. No. 11, sec. 15), the complaint, difference, or dispute must have arisen while the relation of master and servant subsisted: *Newham v. Buckley* (3 S.C.R. (Q.) 216).

A domestic servant sued her mistress under sec. 5 Master and Servant Act, and obtained damages for wrongful dismissal. The Act gives no power to justices to award damages and a prohibition was granted: *Ex parte Gorton* (14 S.C.R. 529).

A summons had been taken out in a Warden's Court in December, 1865, under the Quartz Drainage Act, No. 153. The summons was adjourned till 26th January, 1866, when the warden made an order for payment against the defendant of £12 forthwith, and £2 a week until December, 1866. The Act No. 291 repealed Act No. 153 from December 31st, 1865, but kept alive certain proceedings and gave power to Mining Boards to assess drainage rates, under which some Mining Board would have to assess the reef in question for part of the year 1866 covered by the warden's order. *Held*, that the warden's order was valid and the rule was discharged: *R. v. Webster* (3 W.W. & A.C.L. 17).

A prohibition was granted in respect of an order made by a District Court: the complainant in an action testing the legality of the forfeiture of shares in a gold-mining company should take his proceedings in the Supreme Court under the Companies Act 1863—the District Court has no jurisdiction given it by the Gold Fields Act 1874, or otherwise, to entertain such an action: *South New Zealand G. M. Co. v. Bullen* (1 Q.L.J. 50).

Land held under perpetual lease under sec. 136 The Land Act 1885 is not Crown lands within sec. 14 The Mining Act 1891, and is therefore

not liable to be taken up for mining purposes, though within a mining district, unless it has been first resumed by proclamation. A warden was proceeding to deal with an application for a special claim over land comprised in such a lease. A prohibition was granted—the warden was proceeding to deal with land which was not within his cognisance : *Mackenzie v. Couston* (17 L.R. (N.Z.) 228).

Prohibition sought in respect of an order of a mining warden on the ground that he had no jurisdiction over the subject matter, as it related to mining on private property (sec. 216 Mines Act 1890, Victoria). But rule discharged—the warden had such jurisdiction under sec. 336 of the Act : *Hawthorne v. Henderson* (15 A.L.T. 83).

A person who had obtained goods by a false representation was summarily convicted under sec. 3 of the Vagrant Act, 15 Vic. No. 4 : a prohibition was sought on the ground of excess of jurisdiction, in that a case of false pretences had been disclosed. “That principle of merging misdemeanour in felony has certainly been discarded, and therefore I cannot see why we should introduce the practice of merging a misdemeanour in a delinquency.”—*Cockle, C.J. : Ex parte Gurney* (3 S.C.R. (Q.) 170).

Prohibition to restrain enforcement of an order by justices for payment of £7 ; the ground was that complainant in the Court below had entered into a contract in writing to do the work, and defendant alleged he had not complied with the contract, and therefore the justices had no jurisdiction. An affidavit, however, was filed by complainant that the defendant had accepted the work and took the benefit of it. The Court *held* that the defendant having accepted the work could be sued for work and labour done. Rule discharged : *R. v. Lloyd* (1 A.J.R. 78).

An Order in Council empowered the Native Land Court to apportion certain lands amongst the descendants of a certain native : the Court apportioned some of the lands to the native's sister. A prohibition was granted : *Wiremu Pomare v. Piukanana* (14 N.Z.L.R. 340).

On application for probate of a deceased native's will, the Native Land Court, under sec. 46 of the Native Land Court Act 1894, awarded a successor of the deceased native not provided for in the will, who had not sufficient land for his support, a piece of land specifically devised by the will, other lands being specifically devised to other beneficiaries. It was *held* that the Court had power to do this, but ought to have applied the principle of abatement to the other legacies. However, a prohibition was refused : the Court had not exceeded its

jurisdiction by granting this land: *Attorney-General v. Seth Smith* (25 N.Z.L.R. 557).

Plaintiff sued defendant in the District Court for (1) accounts of all sums received and paid by the defendant as agent; and (2) payment of the money found due. Jurisdiction is conferred on the District Court by sec. 3 The District Courts Jurisdiction Act 1893—"Every District Court shall have jurisdiction over all cases of a civil nature, whether legal or equitable, in which the claim or demand . . . shall not exceed £500." A prohibition was granted, it being *held* that the only accounts that could be ordered are partnership accounts: *Thompson v. Campbell* (19 N.Z.L.R. 177).

Justices ordered the applicant to be of good behaviour for 12 months, and for that purpose to enter into recognisances, or in default be imprisoned. They purported to act under 34 Ed. III. c. 1, which empowers justices to bind over "all them that be not of good fame." On motion for prohibition, it was *held* that the jurisdiction of justices under that Act was restricted by the Defamation Act, 11 Vic. No. 13, in respect of defamatory libels. A prohibition was granted: *O'Kane v. Sellheim* (1 Q.L.J. 85).

Justices have no power under sec. 273 Local Government Act 1874, to adjourn any particular case to another sessions, but may adjourn the sessions. An adjournment of all business of the sessions is an adjournment of the sessions itself: *R. v. Gillespie*; *Ex parte The President, &c., of the Shire of Bulleen* (13 V.L.R. 304). [But see now No. 1893, sec. 301 (5).]

17 & 18 Vic. c. 31, sec. 2, obliges railway companies to "afford according to their respective powers *all reasonable facilities* for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages trucks boats and other vehicles." A company made a charge for conveyance of passengers in excess of the charge allowed by their special Act, and the Railway Commissioners granted an injunction to restrain the making of this charge on the ground that it was a refusal of "reasonable facilities" within the above section. A prohibition was granted—the Commissioners had no jurisdiction to restrain the making of such charges. *Semble*, that if the overcharges were of such an amount and of such a nature that they had the effect, or it could be presumed that they were made with the intention, of preventing the use by passengers of particular trains and stations, the Commissioners might have jurisdiction to entertain a complaint in respect of them as being a refusal of "facilities": *G. W. Railway Co. v. Railway Commissioners* (7 Q.B.D. 182).

The Railway Commissioners under 36 & 37 Vic. c. 48, made an order requiring two railway companies to make arrangements for the transference of traffic from one line to another, to arrange for the arrival of trains at a junction in a particular manner, and directing one of the companies to run trains over a disused branch line; upon non-compliance with the order, the companies were fined, but a prohibition was granted; assuming the Commissioners had jurisdiction to require each company separately to give facilities according to its powers, they were not entitled to order two companies to act jointly in doing what neither could do separately: *Toomer v. L.C. & D. Railway Co.* (2 Ex. D. 450).

The clause of the 8th section of the Regulation of Railways Act 1873, which enables one party to apply for the arbitration of the Railway Commissioners "where any difference between railway companies is, under the provisions of any special or general Act, required or authorised to be referred to arbitration" does not apply to all cases in which the agreement under which the difference has arisen has been made under the provisions of a special or general Act, but only to cases in which the specific difference has been required or authorised by a special or general Act to be referred to arbitration. So, where two companies made an agreement under a special Act, and further agreed to refer differences thereunder to arbitration under the Railway Arbitration Act 1859, and one of the parties called upon the Commissioners to decide their differences under the 8th section of the Regulation of Railways Act 1873, a prohibition was granted—the Commissioners had no jurisdiction as the specific difference was not required by Act to be referred to arbitration: *Great Western Railway Co. v. Waterford & Limerick Railway Co.* (17 C.D. 493).

Where a verdict was given in a Small Debts Court for rates which the council had no authority to impose, the property not being rateable under any circumstances, a prohibition was granted: *Ex parte Hobbs* (3 W.N. 134).

Where the council has authority to impose a rate on the land in question, prohibition cannot issue if the rate is excessive—that is a mere mistake in law: *Ex parte Scandritt* (15 W.N. 244).

Justices held an appeal under sec. 185 Local Government Act 1878, against the valuation of certain property: the justices assumed to decide the appeal and also that the property was exempt from rating, as it came within the exemptions in sec. 176. It was held that the justices had no jurisdiction to determine whether the property was rateable or not; all they had to determine was the correctness of the



valuation : *In the matter of The Brisbane Municipal Council v. Watson* (1 Q.L.J. 127).

The Judge of an Assessment Court sitting under the Rating Act 1894, decided that the meaning of the Rating Act was that only land over four acres in extent could be rated, and that four acres in question were exempt from rates. He therefore decided to reduce the ten acres on which rates were claimed to six, and to reduce the rateable value accordingly. It was *held* that he had no jurisdiction to determine the question of the rateability of a property and had no power to amend the valuation list by striking out a property on the ground that it was not rateable. A prohibition was granted. "If the Assessment Court has jurisdiction to decide upon the rateability of property, then this Court cannot review its decision, either in law or in fact. No right of appeal is given by the statute. This is not like the class of cases of which *In re Elston v. Rose* (L.R. 4 Q.B. 4) is an example : see *Thompson v. Ingham* (14 Q.B. 710), *In re Brown v. Cocking* (L.R. 3 Q.B. 672), &c. *This is not a preliminary question collateral to the jurisdiction.* If there is jurisdiction, the question is rateability or not, and the decision of the Assessment Court is final—see *Brittain v. Kinnaird* (1 Br. & B. 432) ; *Reg. v. Bolton* (1 Q.B. 66) ; *The Colonial Bank of Australasia v. Willan* (L.R. 5 P.C. 417) and other cases. It is because, in my opinion, the Appeal Court has determined that the Assessment Court has not the jurisdiction to decide on rateability that this prohibition must go." —*Stout, C.J. : Mayor, &c., of Wanganui v. Stanford* (23 N.Z.L.R. 959).

A local Act enacted that certain rates might be recovered in the superior Courts. A subsequent public and general Act gave jurisdiction to the County Courts in pleas of personal actions. *Held*, that an action for such rates was within the jurisdiction of the County Courts : *Stuart v. Jones* (1 E. & B. 22).

The University of Oxford cannot fine and imprison a tradesman for suing one of its members in the Common Law Courts : *Chancellor of Oxford v. Taylor* (1 Q.B. 952).

Sec. 25 Weights and Measures Act 1878 imposes a penalty upon persons having in their possession for trade purposes a false or unjust scale ; an information under the Act was laid against the master of a post office, who also traded as a baker upon the same premises, for having in his possession for use for trade an unjust scale. The scale belonged to the post office and was the property of the Crown. A prohibition was granted—the justices had no jurisdiction to hear and determine the *matter* of the information, because the provisions of the Act did not apply to scales which were the property of the Crown : *R. v. Kent, JJ.* (24 Q.B.D. 181).

The consistory Court has no jurisdiction to hear exceptions to an executor's inventory. Nor has it jurisdiction to examine witnesses  *viva voce* : *Griffiths v. Anthony* (5 A. & E. 623); *Henderson v. French* (5 M. & S. 406).

Where the spiritual Court ordered an executor to distribute the surplus of a deceased's estate, a prohibition was granted: that Court can only compel distribution where the party dies intestate: *Petit v. Smith* (1 Ld. Ray. 86).

Prohibition granted to restrain an action in the spiritual Court for defamatory words uttered in giving evidence in a Court Leet: *Anfld v. Feverill* (1 Rolle 61).

Prohibition to restrain the spiritual Court from proceeding on a libel indictable at common law: *Anon.* (Comb. 71). Cf. *Galizard v. Rigault* (2 Salk. 552); *Hollingshead's Case* (Cro. Car. 229).

The Ecclesiastical Court has power to try an offence which is also punishable temporally, where the Ecclesiastical Court is proceeding by reason of the scandal to the church: *Dean of Jersey v. Rector of ———* (3 Moo. P.C. 229). Cf. *Slater v. Smallbrook* (1 Sid. 217; 1 Lev. 138).

Libel against B. in a spiritual Court for breaking a hole in the church wall and cutting down a tree in the churchyard; order against B. for costs and a monition issued. Prohibition granted—the ordinary could not punish a trespass on the body of the church which did not hinder the service: *Binsted v. Collins* (Bunb. 229).

#### 14. *Substance, not form, of action to be regarded.*

A summons in the County Court required defendant to appear to answer the plaintiff in an action of tort for assaulting the wife of the plaintiff and maliciously causing her to be charged with felony and conveyed to a police cell and kept in custody, and causing her to find sureties to await an indictment, whereby the plaintiff was put to expense in producing witnesses to clear her from the charge, to the plaintiff's damage of £10. At the hearing, no assault was proved, except the constructive one of giving the plaintiff's wife in custody on the charge of felony, but the Judge found for the plaintiff. A prohibition was granted—the cause of action was really for a malicious prosecution, and the County Court had no jurisdiction (sec. 58 of 9 & 10 Vic. c. 95): *Jones v. Currey* (2 L.M. & P. 474).

A railway company took proceedings before the magistrate to recover a penalty for travelling without payment of the fare. The charge was dismissed, and thereupon the defendant sued the company in a County Court for the expenses to which he had been put in defending

the prosecution. *Held*, that the substance of the plaint must be looked to, and that as no agreement to pay such expenses was alleged, the action was an attempt to evade the statute taking away jurisdiction in cases of malicious prosecution : *Hunt v. North Staffordshire Railway Co.* (2 H. & N. 451 ; 26 L.J. Ex. 374).

In trying a plaint for false imprisonment, the Judge used expressions indicating that he gave damages as for malicious prosecution, a cause of action over which he had no jurisdiction. *Held*, that the plaint being within the jurisdiction, prohibition would not lie even if damages were given on the basis of an action for malicious prosecution. *Jones v. Currey* (2 L.M. & P. 474), distinguished : *Chivers v. Savage* (5 E. & B. 697 ; 25 L.J.Q.B. 85).

Under the Maori Land Claims Adjustment and Laws Amendment Act 1904, sec. 26, the Native Appellate Court had jurisdiction to determine native boundaries, but not to determine whether or not lands had been formerly confiscated for rebellion. The Appellate Court determined the question of boundaries on a basis which involved the question of confiscation. *Held*, that as they had determined an issue strictly within their jurisdiction, prohibition did not lie, even if the reasons for the decision were wrong : *In re Te Akau Block* (27 N.Z.L.R. 1).

A. sued B. in a Small Debts Court for unlawful detention of a horse ; the evidence showed that the horse was detained at a place outside the jurisdiction of the Court, and, on verdict for plaintiff, a Judge granted a prohibition. On appeal, it was *held* that the Judge was technically right, but that as the evidence showed an agreement to return the horse at a place within the jurisdiction and a breach of such contract, the plaint should have been amended so as to make the action one for breach of contract and a prohibition was refused : *R. v. Isisford JJ.* ([1902] S.R. (Q). 250).

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## ii. Condition Precedent.

Where jurisdiction is conferred by a statute conditionally upon compliance with the requirements of such statute, failure to comply with those requirements is a ground for prohibition ; but mere irregularity of procedure or failure to comply with directory provisions of a statute is no ground for prohibition.

Whether a provision of a statute is mandatory or directory only is to be determined in each case upon the construction of the particular statute.

“If the statute provided that before the warden proceeded, the summons must be served personally, then undoubtedly there would be grounds for a prohibition, because the service of process would be a condition precedent to the jurisdiction of the warden to hear the case. It has been laid down for many years gone by, and, it seems to me, consistently with common sense, that for mere matters of procedure, or mere irregularity of procedure, prohibition will not be granted. . . . If any error occurred in this case through the regular procedure not having been followed in accordance with the regulations, the defendant should have appealed. He has not done so, but has come here and asked us for another form of relief (*i.e.*, prohibition) to which, in my mind, he is not entitled.”—*Burnside, J.*, in *Moderana v. Backhouse* (7 W.A.L.R. 39); affirmed by the High Court in 1 C.L.R. 675.

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“The appeal was brought under a statute which provides that the application for the case shall be made to the Court, *i.e.*, the justices ‘within such time and in such manner as may be from time to time directed under this Act.’ Rules were made under the Act, one of which provides, in substance, that the application shall be made to the justices in writing. That rule being made, it is the same as if the provision had been enacted by the statute itself. There are a series of decisions, beginning with *Morgan v. Edwards* (5 H. & N. 415), which appear to be to the effect that where a statute, made with regard to a precisely similar subject-matter, contained a similar direction to that contained in this rule, such direction was not directory only, but compliance therewith was a condition precedent to the jurisdiction to entertain the appeal.”—Lord *Esher, M.R.*, in *Lockhart v. Mayor, &c., of St. Albans* (21 Q.B.D. 188).

“ There is a broad distinction between the case cited and relied on (*i.e.*, *Lockhart v. The Mayor, &c., of St. Albans*, 21 Q.B.D. 188), and the other cases as to practice and procedure. In that case it was in effect provided *by the statute* that certain things should be conditions precedent, but it was left to the rule-making body to define these conditions precisely. In this case the conditions are contained and defined in the section itself: the application (*i.e.*, to the inferior Court) must be made within three months after the decision, and it must be made to the Chief Judge in writing. These are the express conditions contained in the section and *no power is given to make other conditions by rule*. Without expressing any opinion upon the criticism of Mr. *Baldwin* upon the power to make rules, it is sufficient to say that these rules are for practice and procedure, and that all the cases show that where it is a mere matter of practice and procedure the superior Court will not interfere. The inferior Court may go wrong in deciding that its rule has been complied with, and the Legislature has provided no appeal; but it does not follow that it is a matter for prohibition.”—*Prendergast, C.J.*, in *Rangipo Mete Paehehe & others v. Butler & others* (15 N.Z.L.R. 43).

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“ But where the matter is clearly within the jurisdiction of the inferior Court, a mere error in the proceedings may be a ground of appeal or review, but not of prohibition.”—*Bacon's Abridgement, Prohibition (K.)*.

“ We agree with the argument addressed to the Court on this point, that, when an inferior Court is proceeding in a matter within its jurisdiction, prohibition will not go merely because the decision can be shown to be based on error in law or fact, or even where there is mere irregularity in the procedure—*Reg. v. Bolton* (10 L.J.M.C. 48); *In re*



*Roche* (7 N.Z.L.R.) 206.”—Full Court (N.Z.) in *Winiata te Wharo v. Airini Tonore* (14 N.Z.L.R. 209).

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“ But even assuming the service (of a summons) to have been defective, at the most it amounts to an irregularity in the procedure, and not to an excess or want of jurisdiction, which must be shown to entitle the applicant to prohibition.”—*Chubb, J.*, in *Boland v. Almeni* ([1906] S.R. (Q.) 217).

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“ If they (*i.e.* inferior Courts) will not pursue their rules and order of justice that is not a cause of prohibition, but appeal.”—*Richardson, J.*, in *Denne & Sparke’s Case* (Het. 113).

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The observance of a rule of practice is not a condition precedent to the jurisdiction: *Zohrab v. Smith* (17 L.J. Q.B. 174); *Rackham v. Bluck* (9 Q.B. 691).

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“ Had the proceeding been simply irregular, that would have afforded no ground for the exercise of our extraordinary jurisdiction, as irregularity by a Court having general jurisdiction is no ground for prohibition, but of appeal.”—*Mellor, J.*, in *Martin v. Mackonochie* (3 Q.B.D. at 744).

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“ Prohibition is the common law proceeding by which any of the superior Courts at Westminster (not the Queen’s Bench only) are enabled to restrain, amongst others, the Courts Ecclesiastical from acting in excess of their jurisdiction; but it does not enable the temporal Court to act as a Court of appeal from the Court Ecclesiastical, so as to correct any irregularity or even injustice which may have

been done by the Ecclesiastical Court, if done in the exercise of their jurisdiction.”—Lord *Blackburn*, in *Mackonochie v. Lord Penzance* (L.R. 6 A.C. 443, 444).

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“ It was contended that the sentence of suspension . . . . . was contrary to two statutes of the realm (3 & 4 Vic. c. 86, and 53 Geo. III. c. 127) ; and if this could be made out, the prohibition was rightly granted. But, if this is not so, the question resolves itself simply and entirely into one of the proper course, practice, and procedure of an Ecclesiastical Court in a case of which that Court had proper cognisance, against a person and in a matter properly subject to its jurisdiction. Such a question ought, in my opinion, to be determined in the Ecclesiastical and not (by prohibition or otherwise) in any temporal forum, notwithstanding the fact that, by a sentence of suspension a *beneficio* (which the Ecclesiastical Courts, and those Courts only, have power to pronounce), temporal rights, held by an ecclesiastical tenure, in consideration and upon the condition of the performance of ecclesiastical duties, are necessarily affected. Supposing no statute to intervene, the Ecclesiastical Courts must have jurisdiction to determine questions of this nature ; and if they have jurisdiction, prohibition does not lie to them from the temporal Courts. The remedy (if there be any error in judgment) is by appeal.”—Lord *Selborne*, in *Mackonochie v. Lord Penzance* (L.R. 6 A.C. 431).

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The Judge of the Mayor’s Court referred a matter to arbitration against the consent of the parties. In granting a prohibition on this ground, *Charles, J.*, after citing *Thesiger, L.J.*, in *Martin v. Mackonochie* (4 Q.B.D. 697), added : “ It is extremely difficult to distinguish sometimes between what is excess of jurisdiction and what

mere irregularity of procedure. Clearly prohibition will not lie for mere irregularity of procedure ; that is the whole purport of Lord Justice *Thesiger's* judgment on that point. But where a tribunal contrary to law is constituted by a Judge—where he confers on another, without statutory authority, the right to deal with a subject matter, though in his (the Judge's) jurisdiction, I am of opinion that he is acting in excess of and without jurisdiction, and is therefore a ground for prohibition": *In re The London Scottish Permanent Building Society* (63 L.J.Q.B. 112).

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“ It is said, however, that it (*i.e.* what was done by the Court of Arches) cannot be regarded as procedure only. Now, this is a very difficult question to discuss. What is procedure, and therefore, if wrong, matter of appeal only ; and what is jurisdiction, and if wrongly asserted, matter for prohibition, is almost impossible to define in general language. The same thing will often strike different minds, some as error in procedure, some as excess of jurisdiction. I do not pretend to speak with confidence in a matter where so many of my colleagues differ from me, but I am unable to see that this is anything but procedure. The subject matter is clearly within the jurisdiction of the Court Christian. It matters not that as has been suggested, Mr. Mackonochie might be indicted for a breach of the statute law in ministering contrary to the Act of Uniformity. He is accused of an ecclesiastical offence. The punishment is one which for this offence the Court Christian may inflict. It is said that it has been arrived at by a wrong process. I do not think so ; but if it has, what is arriving at a legitimate end by a wrong road but erroneous procedure ? In *Ex parte Smyth* (3 A. & E. 719) the Court of Appeal decided something not matter of appeal, and on which the appellant had not been heard : *Held* procedure. In *Couch v. Toll* (March. 98) the Court

had proceeded then to sentence without any citation of the person sentenced. *Held*, that, whether citation was needful for the practice of the Court or not, it was error in procedure, and not matter for prohibition. In *Shatter v. Friend* (1 Sho. 158, 172) the prohibition went because the Judges thought the matter a temporal one—it was a question of proof of payment by a single witness; but it was admitted that if the matter was ecclesiastical the prohibition would have been refused; and Lord *Holt* doubted, though he ultimately concurred with the rest of the Court, and admitted that the resolution of all the Judges (reported by Lord *Coke*, in 2nd Inst. 608) was ‘mighty strong’ with his doubt, as indeed, says Sir *Bartholomew Shower*, it certainly was. In *Breedon v. Gill* (1 Ld. Ray. 219), Lord *Holt* lays down the principle in these terms: ‘When the Ecclesiastical Courts are possessed of a cause which is merely of spiritual cognisance, the Courts of common law allow them to pursue their own methods in the determination of it.’ In *Rex v. Payton* (7 T.R. 153), one of the grounds of the prohibition (the other two not being material here) was, that the Ecclesiastical Court had pronounced a sentence not warranted by law or practice; but Lord *Kenyon* said, delivering the judgment of the Court (himself, *Grose* and *Lawrence*, JJ.) ‘that is only a ground of appeal; it is merely that the Judge has not proceeded according to the proper forms of the Ecclesiastical Court.’ In *Ackerley v. Parkinson* (3 M. & S. 411) the question was not one directly of prohibition, but it was an action against ecclesiastical Judges for proceeding to sentence in a cause begun by a citation, which, as the delegates determined, was a nullity. It was held, nevertheless, that the proceedings, though erroneous, were not without jurisdiction, and *Bayley*, J., at p. 428, makes these, to my mind, very pertinent remarks: ‘This is a matter which they must know as connected with their practice; but how are we as Judges of the common law, to know whether these proceedings have

been such as the writ or canon law requires ? Our knowledge of what is conformable or not to that law is chiefly derived from our practice of exercising jurisdiction over those Courts in the matter of granting prohibitions. If it appears that the Ecclesiastical Judge has either no jurisdiction, or has exceeded his jurisdiction, this Court is in the habit of interfering by granting a prohibition. But if the Spiritual Court has jurisdiction ' (*Le Blanc, J.*, explains this by saying ' over the subject matter ' ) ' I am not aware of any instance in which this Court has granted a prohibition, *except in cases where it proceeds to trial of a matter triable only by the common law, or allows a thing not allowed by the common law, or where the construction of a statute, which is peculiarly confined to the common law, comes in question.*' Subject to the argument arising on the Church Discipline Act, every word of this appears to me in point in this case. In *Ex parte Story* (8 Ex. 195), a prohibition was prayed for to restrain the Ecclesiastical Court from proceeding to punish a man for disobedience to decrees made behind his back and without notice. But Lord *Wensleydale* said : ' There is no doubt that here the Ecclesiastical Court has jurisdiction over the suit ; but if any proceeding of an irregular nature has taken place in that suit, it does not take away the jurisdiction of the Court, but merely gives the party a remedy by application to the Court itself or by appeal. What has been done in this case does not amount to a contravention of natural justice.' In *re Crawford* (13 Q.B. 613), was not a case of prohibition, but of refusing, or rather setting aside, a *habeas corpus* ; but it is worth notice as showing that the Courts at Westminster will not interfere with the procedure of other Courts (the Court in question was the Chancery of the Isle of Man) although such procedure would not be lawful if pursued by themselves. Of course, in none of these cases were the circumstances exactly the same as the circumstances in the case before us. If they were, the



arguments of counsel and our judgments would have been short indeed ; but I think they establish this, that where the subject matter is for the Court Christian, and where the act done is something which the Court Christian can itself do, the steps by which the Court arrives at the act, however erroneous they may be, are matter of appeal and not ground of prohibition. I have said that I think the steps in this case right, but if I thought them wrong, my conclusion would be the same. It is said, however, that if the procedure involves something contrary to natural justice the Court will be prohibited ; and I agree it will and ought to be.”—*Coleridge, C.J.*, in *Martin v. Mackonochie* (4 Q.B.D. 786–788).

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*Illustrations.*

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2. (a) *Information disclosing no offence*—Duplicity—Conviction of offence not charged, p. 107.

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1. *Plaint, &c., no cause of action*—Defective *plaint*—Absence of information or charge.

An action was brought in the Magistrate's Court ; the *plaint note* filed under sec. 68 The Magistrates' Courts Act 1893, after giving the ordinary heading (showing the Court, and the names, places of abode and occupations of the parties) was in the following terms : “ The plaintiff claims to recover from the defendant the sum of £95, and requests that a summons may be issued forthwith.” At the hearing, objection was taken to the jurisdiction on the ground that the *plaint note* did not state “ the substance of the action intended to be brought.”

The magistrate overruled the objection and found a verdict for the plaintiff. A prohibition was refused : the provisions of sec. 68 had been complied with. *Per Stout, C.J., Williams, Denniston, Cooper and Chapman, JJ. ; Edwards, J.*, dissenting, pointed out that it had already been decided in *Hewitt v. Carew* (22 N.Z.L.R. 569) and *Loram v. Brubant* (22 N.Z.L.R. 990) that it is a condition precedent to the entry of a plaint in the plaint book that a plaint note which complies with the provisions of the statute shall first be filed ; that the statute had not been complied with and that the writ should issue : *Hills v. Stanford* (23 N.Z.L.R. 1061).

A plaint in the Small Debts Court showed in the particulars that the action was for a debt more than six years old, but did not allege that there had been any acknowledgment. *Held*, that it was not necessary that the acknowledgment should be alleged in order to give the Court jurisdiction : *Ex parte Baker* (8 S.R. 16).

Where no plaint is filed in the Small Debts Court, the justices have no jurisdiction ; in this case a document was filed which a majority of the Court *held* complied with the requisites of a plaint, and a prohibition was refused : *Ex parte Osborne* (14 S.C.R. 338).

A. sued B. in the Small Debts Court under 10 Vic. No. 10, and the plaint alleged that B. was indebted to A. in £10 for money paid to certain witnesses for loss of time and travelling expenses in attending on a summons issued by B. against A., and for damages sustained by A. in defending himself against a charge of illegal possession of a horse alleged to be B.'s property, which charge was abandoned. The justices found a verdict for A., and a prohibition was sought on the grounds (1) that the plaint filed in the case disclosed no substantial cause of action, and (2) that the justices had no jurisdiction. It was objected that the Act gives justices power to deal with a demand of any kind not exceeding £10, whether recognised by the law or not, and to determine it, not in reference to any settled principles, but as equity and good conscience in each case may suggest, and that if the tribunal is seised of a cause it cannot be dispossessed of it. It was *held*, however, that *the subject matter of the jurisdiction was limited to demands which might be prosecuted according to the course of the common law* : that the plaint did not disclose any cause of action, nor did any evidence appear to enable the Court to uphold the decision of the justices, and a prohibition was granted : *In re McMullen* (3 S.C.R. (Q.) 205) ; and see *Tait v. McCallum* (13 N.Z.L.R. 232).

A prohibition was sought against a Small Debts Court on the ground that the plaint disclosed no cause of action ; this was *held* no ground for a prohibition—the Court had jurisdiction to deal with the matter, and if they decided that there was a cause of action that did not show want

of jurisdiction, but a mere mistake in law : *Ex parte Heggie* (9 W.N. 100).

A plaintiff by a father for defamation of his daughter was *held* to disclose no cause of action, and a prohibition was granted : *Re Thomas* (Tarl. 141).

A trustee of a National school sued defendant for £4 10s., the amount promised by defendant as a subscription for himself and his wife and daughter towards the building of a schoolroom. The magistrate gave judgment for plaintiff, and a rule *nisi* for a prohibition was sought on the ground that the plaintiff showed no cause of action, and that the promise was *nudum pactum* without consideration. The Court refused to grant a rule *nisi* for a prohibition. *Gwynne, J.* : “ . . . the Legislature has given this Court no power to interfere. I find this view of the matter taken in England, for in several cases under the Act it has been held that prohibition will not lie to a Judge of a County Court on the ground that in deciding what it is competent for him to decide he has made a mistake in point of law, *because his judgment is unwise or unjust*. It must be shown that he has exceeded or is about to exceed his jurisdiction. In this case the judgment in my opinion is unwise, illegal and unjust ; but still this Court has no power whatever to interfere. The point was argued in *Ellis v. Watt* (8 C.B. 614) ; *Jones v. Jones* (5 D. & L. 628) ; and *Foster v. Temple* (*ib.* 655).” *Boothby, J.*, took a contrary view—“ for the jurisdiction of this Court must by express words be taken away where there is an entire absence of jurisdiction in the Court below, as in the present case, to try matters of this kind. My learned colleague has said that the decision in this instance is perfectly illegal, and, unless the Legislature prohibits by express enactment, we may exercise over Courts of inferior jurisdiction the same powers as are exercised by the Courts of Westminster Hall.” *Hanson, C.J.*, said—“ Even, therefore, if the decision of the point was altogether erroneous in point of law, which certainly appears to have been the case, the matters were clearly within its jurisdiction, and the Act gives no power to this Court to interfere. No authority was cited in support of the motion, and in addition to the cases referred to by Mr. Justice *Gwynne*, the cases of *In re Rayner* (5 C.B. 162) ; *Guardians &c., of Loxden v. Southgate* (10 Exch. 201) are distinct authorities in support of the view now taken by the Court. There will, therefore, be no rule” : *Phillips v. Bennett* (0 S.A.L.R. 75). And see *Purcell v. Perpetual Trustee Co.* (15 N.S.W.R. 385).

After judgment against an executor to be levied *quando acciderint*, the plaintiff took out a summons suggesting a *derustavit*, which summons did not state that the assets had come to the defendant's

hands after judgment. *Held*, a mere irregularity, and prohibition refused : *Ellis v. Watt* (8 C.B. 614).

A summons was issued returnable in a Warden's Court to revoke a conditional registration "on the ground that the same was illegally obtained." The defendant appeared and objected, but an order was made against him. Sec. 70 Mining Act requires every proceeding to be commenced by summons "which shall be filled up so as to show the substance of the facts constituting the cause of complaint." A prohibition was granted—the Court has no jurisdiction unless the complaint is brought before it by a summons which shows the nature of the case he has to answer : *Ex parte Long* (11 W.N. 184).

Where a summons in the Warden's Court merely alleged that defendant "was in unlawful occupation of allotment" described and gave no information as to whether the applicant relied upon a question of law or of fact, and the summons did not set out the claimant's title, a prohibition was granted : *Ex parte Banks* (20 W.N. 244).

A summons in the Warden's Court did not show that the applicant had any title in the subject matter ; upon an order being made, a prohibition was granted : *Ex parte Pearson* (13 W.N. 55).

A summons under sec. 70 Mining Act 1874 summoned the applicant as attorney to "recover . . . the sum of £40 in respect of a certain contract entered into on the 8th day of August, 1902, in respect of the sale of the interest in and transfer of Gold Mining Lease, No. 1010, known as Hayes' Reef, at Canowindra aforesaid between W. E. Myring on behalf of the said Harrie Wood as such attorney as aforesaid and the said T. J. Hamilton." It was *held* that this summons sufficiently complied with the provisions of the Act, *Darley, C.J.*, saying : "I do not think the party on whom such a summons was served could have the least doubt as to what was the subject of controversy. It appears to me to be made very plain that the question to be determined was whether the defendant Wood had or had not paid the sum of £40, which Myring had contracted should be paid through his hands. The substance of the facts constituting the cause of complaint is that Hamilton claims that Wood owes him £40 on this contract" : *Ex parte Wood* (4 S.R. 140).

A summons in the Warden's Court for forfeiture of a mining tenement need not show any interest in the complainant, and the warden has jurisdiction to deal with such a summons though no interest is shown. *Ex parte Pearson* (17 N.S.W.L.R. 245) distinguished : *Ex parte English* (7 S.R. 283).

A prohibition was granted in respect of a conviction under 21 Vic. No. 32, by a Mining Warden, on the ground that the summons disclosed

no offence in that it did not allege the ingredients required to constitute the offence under sec. 122 : *Ex parte Barclay* ; *In re Pasco* (2 W. & W. C.L. 38). [See now Mines Act 1890 (No. 1120), sec. 292.]

Where the citation disclosed no offence cognisable by the Ecclesiastical Court, *held* that application might be made at once for a prohibition without waiting for articles : *Francis v. Steward* (5 Q.B. 984).

A compliance with sec. 68 of the Magistrates' Courts Act 1893, requiring the plaintiff's address to be stated in the plaint note, is a condition precedent to the jurisdiction and unless the section is complied with, there is no action in existence : *Loram v. Brabant* (22 N.Z.L.R. 990 ; 5 Gaz. L.R. 419).

Defendant applied for a prohibition on the ground that the plaint note in the Magistrate's Court did not sufficiently contain the plaintiff's address so as to comply with sec. 68 the Magistrates' Courts Act 1893. All that the plaint note contained was a statement that the residence of the plaintiff was Palmerston North. It was *held* that this sufficiently described the plaintiff's place of abode—he was not bound to enter in the plaint note the name and number of the street : *Manawatu Athletic Park Co., Ltd. v. Smith* (8 Gaz. L.R. 419).

It was held that a Magistrate's Court has no jurisdiction to hear an action if in the plaint note the place of abode of a party to the action is not stated. Sec. 68 the Magistrates' Courts Act 1893 provides that upon the application of any person desirous of prosecuting an action in the Magistrate's Court, the clerk shall enter in a book . . . a plaint in writing which shall state the names and last known places of abode of the parties. "No plaint shall be entered until the applicant has filed a plaint note in the prescribed form." Although the plaint was by a public company, the foundation of the action was gone inasmuch as the condition precedent prescribed by statute to the entry of the plaint had not been performed : *Hewitt v. Carew* (22 N.Z.L.R. 569).

By sec. 62 Magistrates' Courts Act 1908, "the assignee of a debt shall not be entitled to maintain any action for the recovery of such debt unless he names the assignor in the plaint note and summons." *Held*, that this provision is mandatory and that the magistrate had no jurisdiction over an action by the assignee against the debtor where the plaint note did not set out the assignor's name. Prohibition was granted : *Friedlander v. Miller* (28 N.Z.L.R. 97 ; 11 Gaz. L.R. 354).

The applicant had been summarily arrested and brought before justices under sec. 57 of the Sale of Liquors Licensing Act. Evidence was gone into, and at its close the further hearing of the case against



the applicant was adjourned. On the day of adjournment the applicant did not appear, and in her absence the justices convicted her. No formal charge or information was exhibited against the applicant. *Held*, that the justices had no jurisdiction to make such conviction, as nothing existed as the initiation or groundwork of the inquiry (*per Stephen*, C.J., and *Cheeke*, J.). *Fancett*, J., dissented on the ground that as all the proceedings that took place appeared to be fully equivalent to the issuing of a summons, both as regards the giving of jurisdiction to the magistrate and notice to the defendant, the conviction ought to stand. (All the Judges agreed that the provisions of 11 & 12 Vic. c. 43, sec. 16, had no application except to the hearing or further hearing of an information or a complaint exhibited under that statute): *Ex parte Conn* (4 S.C.R. 354).

A master of a ship was summoned by the Marine Board to an inquiry as to the stranding of a ship. He attended and gave evidence; afterwards the Board, without giving him any notice that his conduct as master was to be the subject of inquiry, cancelled his certificate. A prohibition was granted—"to found the jurisdiction of any Court there must be a specific charge."—*Lilley*, C.J.: *In re J. F. Hummel* (3 Q.L.J. 50). And see *Ex parte Setterfield* (21 N.S.W.R. 331; 17 W.N. 174).

When a case against the applicant under the Games, Wagers and Betting Houses Act, 1902 No. 18, came on for hearing, the applicant was not present, but was represented by counsel. The charge originally laid disclosing no offence, a fresh one was handed in and read. Counsel for the applicant stated that he had no instructions to appear for the applicant except upon the original charge and withdrew from the case, but the magistrate proceeded and convicted the applicant. A prohibition was granted: the magistrate had no power to proceed with the new charge as the defendant was not present either personally or by counsel: *Ex parte Dunn* (5 S.R. 117).

A. was convicted for hawking goods without having a license: the Act No. 281, sec. 22, provides that penalties thereunder may be sued for and recovered by information in writing. As there was no information in writing, a prohibition was granted: *R. v. Jackson*; *Ex parte Rapken* (8 A.L.T. 146). [See No. 1097, sec. 22.]

A prohibition to the Native Land Court was sought on the ground that the Court had no jurisdiction to sanction a scheme of arrangement which had not been reduced into writing—but it was *held* that the Court had jurisdiction without such writing: *Pohuka Hapuku v. Smith* (12 L.R. (N.Z.) 155).

2. (a) *Information, &c., disclosing no offence—Duplicity—Conviction of offence not charged.*

“The offence should be described in the information clearly and definitely, without duplicity, or uncertainty; and where the Statute creating the offence uses the term ‘unlawfully and maliciously,’ ‘wilfully,’ ‘maliciously,’ ‘knowingly,’ or any other equivalent expression, it should also be used in the information [*R. v. Turner*, 1 M.C.C. 239; *Carpenter v. Mason*, 12 A. & E. 629]. Where synonyms are used in the information, they should be used conjunctively and not disjunctively. The offence may be described in the words of the Act, or similar words, and any exception, exemption, proviso, excuse, or qualification may be proved by the defendant, but need not be specified or negated in the information or complaint: [S.J. Act, 1879, sec. 39; S. J. Act 1848, sec. 14]. . . . . As to the description of the offence, the general rule is (as in indictments), that all the facts and circumstances should be stated with such certainty and precision that the defendant may be enabled to judge whether they constitute an offence, to determine the species of offence, and be enabled to plead a conviction or acquittal in bar of another prosecution for the same offence. [*R. v. Hoard*, 6 J.P. 445]. . . . . When a particular act constitutes the offence, it is enough to describe it in the words of the legislature; . . . . . Lord *Campbell* observed: ‘The general rule now is, that if you follow the words of the Act, the conviction is right’, and *Crompton*, J., in the same case (*R. v. Grant*, 21 J.P. 70) asked: ‘Why should not the words in the conviction have the same sense as in the Act of Parliament?’ In *Ex parte Perham* (23 J.P. 823), Mr. Justice *Hill* observed that, generally speaking, it is sufficient if the conviction follow the words of the Statute. But see *Smith v. Moody* (1903) 1 K.B. 56; 67 J.P. 69.” . . . *Stone’s Justices’ Manual*, (1908) p. 867, 868.

Justices ordered the applicant to be of good behaviour for twelve months, and for that purpose to enter into recognisances and in default to be imprisoned for twelve months. They assumed to act under 34 Ed. III. cap. I., which empowers justices to bind over to good behaviour . . . . “all them that be not of good fame.” A prohibition was sought on the ground that the information did not disclose that the defendant was not of good fame within the Statute. *Lilley*, (C.J.: “The Statute of Edward does not require any information or complaint in writing, and a justice may, on view of any misconduct within that Act, require sureties for good behaviour. The information was, however, in writing, and clearly bad (*Bradlaugh v. The Queen*, 3 Q.B.D. 607). The words complained of should have been set out. As it is,

the information discloses no offence or misconduct amenable to the law. On this objection being urged, as it was, before the magistrates, they should have made a distinct charge, and required the defendant to answer it. This they could have done instantly, but they proceeded to hear the case upon an information which gave the defendant no knowledge of the offence or misconduct imputed to him. He had thus no opportunity to shape his defence, or to sift the evidence of the witnesses against him. A complaint or charge is the foundation of every summary proceeding before justices, whether it be required by statute or not. If required by the statute creating the offence complained of to be in any particular form or to be in writing, or on oath, &c., the procedure required by the Act must be followed. Then the result of the authorities is this—if the defendant appears before the justices and the information is defective in substance or form, he may, nevertheless be then and there properly charged, and the case may be heard unless an adjournment be granted by reason of such defect or irregularity. The defendant may, nevertheless, waive it either expressly or by conduct, as by allowing the hearing to proceed without objection, by cross-examining witnesses or calling evidence for his defence, &c. (*R. v. Hughes*, 4 Q.B.D. 614; *Blake v. Beech*, 1 Ex. D. 320). In effect, the original information or complaint ceases to be practically material when ‘it has performed its twofold object of informing the defendant of the nature of the complaint against him and procuring or enforcing his appearance.’ (*Reg. v. Paget*, 8 Q.B.D., *per Field, J.*, 155). The information or charge may be made in the presence of the accused, and he may be then and there called upon to answer it; but it must be of an offence or misconduct known to the law. Now, in this case, the justices upheld the insufficient information and proceeded to hear and adjudicate upon the case. The defendant not only insisted on his objection to the information, but urged that there was no charge. Mr. *Marsland*, his attorney, said: ‘I have nothing to answer.’ No charge was thereafter made against the defendant, he asked no questions, called no witnesses, made no defence, and did nothing to waive his right to a regular hearing or to object to the irregularity of the proceeding in the Court below. It is a principle of natural justice, as well as of law, that a man must know of what he is accused before he can be called upon to answer it. There was a failure to observe this elementary rule in this instance, and the applicant’s objection must prevail. This would be sufficient to dispose of the case at this time and to entitle the applicant to our judgment”: *O’Kane v. Sellheim* (1 Q.L.J. 85).

Defendants were convicted upon an information charging them

with "illegally catching fish" in closed waters (sec. 18 of 44 Vic. No. 26), but that section contains no such offence. A prohibition was granted on the ground that the information disclosed no offence: *Ex parte Smith* (12 W.N. 104).

An information charged that the defendant, being the owner of certain lands conditionally purchased, illegally impounded certain cattle therefrom. The evidence showed that defendant was owner and occupier. A prohibition was granted—the information disclosed no offence, because an owner, *qua* owner, has no power to impound: *Ex parte Porter* (19 W.N. 37).

K. was charged on complaint before justices with having unlawfully and wilfully branded with his brand two heifers, the property of the complainant. He set up the defence of a *bona fide* claim of right. The justices convicted him. A prohibition was sought on the ground that the complaint disclosed no offence. *Griffith, C.J.*: "The application is for a prohibition on the ground that the act of which the prosecutor has been found guilty was not an offence known to the law. There is no answer to that. It was not an offence. Although the justices have jurisdiction to convict in some cases, they cannot convict of that which was not an offence." *Real, J.*, concurred: *R. v. Dalby JJ.* (1902 S.R. (Q.) 191).

The father of an illegitimate child, upon complaint made by the mother, under the Deserted Wives and Children Act 1840, as amended by the Act of 1858, stating that he had "neglected and refused to contribute towards the support of the said child" was ordered by justices to make a monthly payment for its maintenance. The objection was taken in the Court below that the complaint disclosed no offence—it omitted to allege that the child was deserted or left without means of support. The Court (*Griffith, C.J., Cooper and Real, JJ.*), granted a prohibition as the complaint disclosed no offence: *The King v. The Justices of South Brisbane; Ex parte Thornton* (1903 S.R. (Q.) 152).

"The rule must be made absolute since the information discloses no offence": *G. B. Simpson, J.*: *Ex parte De Britt* (16 W.N. 69).

A prohibition was granted where the complaint included several rates made under different Acts: *R. v. Mayor, &c., of Richmond; Ex parte Hegarty* (6 V.L.R.C.L. 437).

Where an information was so drawn that it was impossible to say which of several offences it was intended to charge against the accused, a prohibition was granted against the conviction. "In *Ex parte Little* (2 S.R. 444), I said: 'I think that the information is so uncertain that it should be looked upon as disclosing no offence at all.'"—*G. B. Simpson, J.*, in *Ex parte Crichton* (21 W.N. 41).

It is not a ground for a prohibition against a conviction by justices that the information discloses more than one offence. Such an information should not be dismissed by the justices, but the prosecutor should be put to his election and an adjournment granted if necessary : *Ex parte Dunsmore* (25 W.N. 32). And see *Ex parte Williams* (9 S.R. 140).

Where on an information for selling liquor without a license, neither the information nor conviction alleged that the quantity sold was less than two gallons (13 Vic. No. 29, sec. 2), *held* that the summons set out the nature of the offence : " The summons gave the magistrates jurisdiction, and in so plain a case every intendment ought to be made in favour of its exercise " : *R. v. White* ; *Ex parte Sidney* (1 S.C.R. (Q.) 9).

On motion for a prohibition it was *held* that sec. 8 of 5 Will. IV. No. 1 applies only to keepers of licensed slaughtering houses, and not to persons who slaughter cattle for the purpose of consumption by themselves, their families, or their servants. A rule was made absolute on the grounds that the information disclosed no offence, and that there was no evidence to support the conviction. " The conviction is quashed " : *Kelly v. Macarthur* (3 S.C.R. (Q.) 69).

*Stephen, J.* : " I am of opinion that the information is bad, upon the ground that it discloses no offence." *G. B. Simpson, J.* : " I am of opinion that, since the information omits some very material words, it discloses no offence at all." *Cohen, J.* : " If a legal offence is not disclosed by the information to which the accused pleads, and the accused is convicted of the offence as alleged in the information, I am of opinion that the conviction cannot stand " : *Ex parte Price* (16 W.N. 101).

Proceedings were taken before a Court of Petty Sessions by A. against B. upon a complaint which, as amended, stated that B. " made use of abusive and threatening language, viz., I will stouch you in the mouth. You think you are going to run Clifton. You are a nice gentleman, trying to take people down "—whereby a breach of the peace might have been occasioned. No evidence was given to prove that the defendant used the words with the intention of provoking a breach of the peace, and in fact no breach of the peace was occasioned. The justices convicted and fined the appellant. The Court *held* that the information, even as amended, disclosed no offence, and granted a prohibition. " The proper remedy in this case is prohibition, because the charge before the bench was one concerning which they had no jurisdiction. Reference has been made to the case of *The King v. The Justices of South Brisbane* (1903 S.R. (Q.) 152). I mention this because



Mr. *O'Sullivan* said it has given rise to some doubt in the profession as to the powers of this Court as to amendment. I see no reason for any. That was a case of prohibition at common law, in which the question of the powers of this Court to amend did not arise. The information there was required by law to be made in writing, no amendment was made or asked for at the hearing, and on that information, standing as it stood, the justices had no jurisdiction to make any order. Nothing whatever was said in that case to affect in any way the generally accepted view of the power of this Court to make amendments on an application for a quashing order. The order *nisi* for a prohibition will be made absolute": *R. v. Clifton JJ.* (1903 S.R. (Q.) 177).

Application for a prohibition to restrain the enforcement of a conviction under the Licensing Act. Objection was taken that as more than 20 days had elapsed after the conviction, it was too late to have a statutory prohibition: but the second ground of the rule was "that neither the information or conviction shows any offence in law" and the Court allowed the applicant to avail himself of objections to the jurisdiction and not of other objections. Though the applicant had framed his notice in the form of an application under the Justices Act, that did not prevent him obtaining a common law prohibition. It was finally held that, as the information disclosed no offence, a prohibition should go: *Re Williams* (S.M.H., 27, 28 Aug., 1858).

Under the Gaming Act, 14 Vic. No. 9. the provisions are limited to such a house as is described in sec. 1—*i.e.*, a house entered by a warrant issued by a justice on complaint being made to him on oath. A person was convicted of being found in a Gaming House, but there was no proof or allegation that the necessary conditions precedent had been complied with. It was *held* that the Court had no jurisdiction over the subject matter—the oath and warrant are a necessary condition precedent to the initiation of proceedings under the Act. A prohibition was granted: *Ex parte Gaynor* (Legge 1299).

The applicant was charged upon an information with "having in his possession one brand, to wit W5U, the same not being the brand he was entitled to use," and was convicted and fined. The conviction followed the words of the information. *Held*, that, as the information disclosed no offence within sec. 9 of 35 Vic. No. 4, the conviction was wrong, and a prohibition was granted—the word "knowingly" applies to all the offences following that word in that section. His Honour *held* that the ground "that the information discloses no offence under the Brands Act of 1872" was a good ground; but that the ground "that there was no evidence of any offence under the *said Act*" was not good, as it showed that an offence had been committed under sec.

9 of the Act. His Honour continued : " It is to be observed that by the rule *nisi* the objections are taken to the defects in the information, not to those in the conviction. Had objections been taken to the latter, the police magistrate might have had an amended conviction drawn up in accordance with the facts, which no doubt he found proved—namely, that the defendant knew that he had in his possession the branding iron, and that it was such a one that could be impressed upon stock ; and then it would, I think, have been immaterial that the information was defective " : *In re Strickland* (5 S.C.R. (Q.) 201).

*Pennefather*, J., said : " I feel bound by the decision of Mr. Justice *Denniston* in *In re Selig & Bird* (9 N.Z.L.R. 315), to hold that the procedure by way of prohibition is allowable in this case. In fact this case is a clearer case in one sense than *Selig & Bird*, because there it was necessary for the Judge of the Supreme Court to consider the evidence which was before the justices and to decide upon that whether a conviction could be supported. In this case the application is of a simpler character. Mead was charged with having sold oysters taken in contravention of the Sea Fisheries Act 1894. That was made an offence by sec. 47 (1) of that Act. What the magistrate has done has been to convict him under the Amendment Act of 1895 No. 38, sec. 3 (2), which in terms is not an amendment of sec. 47 (1), but is an amendment of sec. 47 (2). That appears to me, taken by itself, to be a fatal objection. Mead is charged with one offence but is convicted of another. Such a conviction must be quashed on the authority of *Martin v. Pridgeon* (28 L.J.M.C. 179), which has already been cited " : *Mead v. Hanson* (17 N.Z.L.R. 410 ; 1 Gaz. L.R. 126).

A defendant, having been arrested on a search warrant under Games and Wagers Act (14 Vic. No. 9), and allowed bail, appeared on the day mentioned in the recognisance, and an objection taken on his behalf that a fresh information and summons should have been served on the defendant was overruled. Upon conviction, defendant sought a prohibition on the ground that no information charging any offence had been issued or served on defendant (*Blake v. Beech*, 2 Ex. D. 335). But prohibition refused—the information, warrant, arrest, charge and conviction were under the same Act, and a fresh information was not necessary : *Ex parte Ah Hing* (8 N.S.W.R. 412).

Defendant was convicted on a summons charging that he had assaulted a police constable in the execution of his duty. The justices, after hearing the case, stated that they dismissed the summons so far as it related to assaulting the constable in the execution of his duty, but that they fined the defendant for a common assault. On application for a *certiorari*, *Crompton*, J., said : " I think that this is a conviction made without jurisdiction ; for I take it, that it must be assumed that

the justices would set out this conviction according to the truth, and that it would show that they had dismissed the summons so far as it regarded the constable acting in execution of his duty, and that they had convicted the defendant of a common assault only on the summons before them. It appears to me that the real question is, whether this is not the case of a summons under one Statute and a conviction under another. I cannot help thinking that this summons refers to an assault punishable under the Municipal Corporation Act (5 & 6 Will. IV. c. 76, sec. 81), and not to a proceeding under the Statute (24 & 25 Vict. c. 100, sec. 42), under which borough justices had the same powers as county justices; for it was not necessary in the summons to state anything with reference to the execution of his duty, if the summons was for common assault only. I do not see how this case differs from that of *Martin v. Pridgeon* (1 E. & E. 778). There the summons charged the accused with being drunk and riotous, and the justices convicted the defendant of being drunk, under another Statute; and that conviction was on that account held bad. It is said that this case comes up in a different way from that of *Martin v. Pridgeon*, where the question was brought before the Court on a special case stated by the justices. Here the motion is for a *certiorari*, and it is said that there is sufficient jurisdiction in the justices to make this conviction. I admit that the mere talking of one magistrate " (one magistrate had said that he did not think that the constable was acting in the execution of his duty) " cannot alter the substance of this case. But I think that there is evidence here that the justices did not convict the accused of anything under the Municipal Corporation Act, but that they have convicted him under the general powers given by another Statute. Therefore, under this summons, they have convicted of something for which they could not lawfully convict. If so, *it is a conviction beyond their jurisdiction*, and so it comes within the ordinary rule, that though the *certiorari* is taken away by the Statute the party is entitled to a *certiorari* to bring the conviction up." *Mellor, J.*: " I am of the same opinion. There are two Statutes which enable justices to deal with cases of assault: the Municipal Corporation Act, the 5 & 6 Will. IV. c. 76, sec. 81, and the 24 & 25 Vict. c. 100, sec. 12. I take it that the justices intended to proceed under the latter Statute. The case, therefore, comes to this: that the summons was granted under one Statute and the defendant convicted under another. The *certiorari* is not taken away where there is an excess of jurisdiction; therefore the *certiorari* must go": *R. v. Brickball* (23 L.J.M.C. 156). [*Note*.—It having been decided that prohibition lies to justices when they exceed their jurisdiction (*R. v. Longe*, 66 L.J.Q.B. 278), it would seem that a prohibition would also have lain in the above case.]

2. (b) *Whether information, &c., disclosing no offence can be amended.*

"A defendant cannot be convicted of a different offence from that stated in the information;—the word 'variance' (11 & 12 Vic. c. 43, secs. 1, 3, 9) points to some difference between the allegation and the evidence, and not to a different offence (*Martin v. Pridgeon*, 28 L.J. 179); but where an information described the service to be with B. and his partners, instead of with 'the R. Company Limited,' the variance was held to be cured. (*Whittle v. Frankland*, 26 J.P. 372). Where the ownership is incorrectly described (*Ralph v. Hurrell*, 40 J.P. 119), or the date of the offence is incorrectly stated, the information should be amended, not dismissed: (*Mayor, &c., of Exeter v. Heaman*, 42 J.P. 503; see also *Masters v. Fraser*, 66 J.P. 100)": *Stone's Justices' Manual*. (1908), p. 34, note (f).

Sec. 65 of 1902 No. 27, 1. No objection shall be taken or allowed to any information complaint summons or warrant in respect of—

(a) any alleged defect therein in substance or in form; or

(b) any variance between any information complaint summons or warrant and the evidence adduced in support of the information or complaint at the hearing.

2. No variance between any information and the evidence adduced in support thereof at the hearing in respect of the time or place at which the offence or act is alleged to have been committed shall be deemed material if it is proved that the information was in fact laid within the time limited by law in that behalf or that the offence or act was committed in New South Wales as the case may be.

3. Where any such defect or variance appears to the justice or justices present and acting at the hearing to be such that the defendant has been thereby deceived or misled, such justice or justices may, upon such terms as he or they may think fit, adjourn the hearing of the case to some future day.

An information under 11 Geo. II. c. 19, sec. 4, did not charge that defendant "fraudulently or clandestinely carried away, &c.," but "unlawfully did carry away." Upon conviction, *Darley*, C.J.: "There is no doubt a defect in the information which does not properly describe the offence as in the Act. This, however, might be cured by amendment under the powers given by the Justices Act (17 Vic. No. 39): *In re Turner* (5 W.N. 11).

Sec. 1 of 11 and 12 Vic. c. 43 (now 1902 No. 27, sec. 65) does not apply where the information discloses no offence: *Ex parte Bartlett* (17 N.S.W.R. 108).

*Stephen, J.*: "We have no formal conviction before us, and all that appears on the depositions is the simple word 'convicted.' I

cannot tell from that whether the man was convicted of the offence alleged in the information, or of the offence intended to be charged and proved by the evidence. Upon an application for a prohibition, I think a proper formal conviction should be forwarded to the Court, so that we may know exactly of what offence the applicant was convicted. The conviction must follow the information, and if the information discloses no offence, neither will the conviction, which shows how important it is that the information should be correct." *Cohen, J.* "If the information is legally insufficient and the accused is orally charged with a legal offence, to which charge he pleads, and, the evidence having been taken in due course of law, the accused is found guilty of the offence orally charged, the conviction will be sustained. If this latter course is adopted, it is very desirable that a note of what has been done should be made upon the depositions. As to sec. 1 of the Justices Summary Jurisdiction Act, there appears to be no case which directly decides the meaning to be attached to the words 'defect therein in substance or in form.' I think those words may be applied in this way, that where a person is charged upon an information or summons which is defective in substance, the magistrate, but for the Act, would be compelled to discharge the defendant; but under the provisions in question he may, the defendant being in custody and before the Court, then and there charge him with the proper offence and proceed with the hearing of the charge": *Ex parte Price* (16W.N. 101).

The applicant was convicted under sec. 6 of 1902 No. 18, the complaint upon which the warrant was issued not being in compliance with the requirements of sec. 4 of that Act. It was held that the warrant was improperly issued, and that the defect in the complaint and warrant could not be cured under sec. 65 of 1902 No. 27. *Pring, J.*, said: "With regard to sec. 65 Justices Act, I think that section has nothing to do with a case of this kind. It refers to an information which charges a person with an offence, because, although the beginning of the section says that no objection shall be taken or allowed to any information, complaint, summons or warrant in respect of any alleged defect in substance or in form, or any variance, when we come to the later part of the section it says: 'Where any such defect or variance appears to the justice or justices present and acting at the hearing to be such that the defendant has been thereby deceived or misled' the justice may adjourn the hearing of the case to some future day. That is to say, if the defendant is misled by some defect or variance, the justice may adjourn the case to enable the defendant to prepare his defence. That would not apply in a case like this, where the defendant knew nothing whatever about the information (*i.e.*, the information upon



which the warrant had been issued) when it was acted upon": *Ex parte Marks* (23 W.N. 140).

A special rule of a colliery provided that any workman absenting himself from duty . . . should be liable to a penalty. An information under the special rule charged the applicant that he being a person employed at the colliery . . . absented himself from duty as a wheeler . . . Held, that the information was sufficient, without stating that the applicant was a workman, and even if it were not, sec. 65 of the Justices Act 1902 would apply to cure the defect: *Ex parte Heffernan* (7 S.R. 774).

S. was charged before justices with having "unlawfully worked an ox the property of G., without the consent of the owner," but the information did not allege the absence of consent of any "other person in lawful possession thereof" (34 Vic. No. 3, sec. 10). It was held that the language of the information did not describe conduct which is necessarily a violation of the law. In granting a prohibition on the ground that the information did not disclose an offence, his Honour said: "The *conviction* which is recorded against the appellant alleges conduct on the part of the appellant in terms which bring it clearly within the prohibitory language of the Statute, and therefore does definitely describe a punishable offence. I have already stated that I am of opinion that the evidence produced before the respondents was sufficient to support a conviction, which would not be otherwise impeachable. But the question for my determination in this appeal is whether a conviction which is supportable by the evidence on which it was based can be sustained if the information which preceded the evidence does not clearly and positively allege a punishable offence. Sec. 7, Magistrate's Summary Procedure Act declares that 'no objection shall be taken or allowed to any information complaint or summons for any alleged defect therein in substance or in form, or for any variance between such information, complaint or summons and the evidence adduced at the hearing of such information or complaint, but if any such variance shall appear to the justice or justices present and acting at such hearing to be such that the person so summoned and appearing has been thereby deceived or misled it shall be lawful for such justice or justices upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day.' In referring to the purport and effect of the same provision in the Imperial Statute, of which ours is a transcript, some text writers speak of it as permitting an amendment of the information (see Paley on Summary Convictions, 7th ed., p. 134; and Stone's Justices' Manual, 13th ed., p. 45); and the head notes of the reports of some of the cases decided in Appellate Courts in England

make a similar reference to it. But it does not appear from the reports of these cases that a written information or complaint in summary proceedings is at any time amended as a pleading in a civil action is amended, and in the case of *Ralph v. Hurrell* (44 L.J.M.C. 145), which is quoted in both the text books I have mentioned as an authority for the statement that an information can be amended, *Blackburn, J.*, stated that he could put no other construction upon the language of the statutory provision relating to a variance between the evidence and the information than that it authorised the justices in the case of a variance 'either to go on and decide the case notwithstanding such variance, or adjourn to a future day if they think that the person summoned has been deceived or misled.' An information or a complaint, which is to be the foundation of summary proceedings, differs widely in its character from a pleading in a civil action, although in the proceedings of which it forms part it serves a purpose parallel to that performed by a plea in an action. A civil pleading is a written allegation of fact or law which passes directly from one of the parties in an action to the other party, and it does not become the foundation or a part of the foundation of a judicial investigation until it has been subsequently submitted in the prescribed manner to the cognisance of a Court. An information or a complaint which has been reduced into writing for use in summary proceedings is an authoritative record of a transaction which takes place under direct statutory authority and in the necessary presence of a person invested by law with the particular administrative and judicial functions which the transaction requires; and in the absence of explicit statutory authority any alteration of its contents does not seem to be permissible. It seemed at one time to have been conclusively determined by the Courts in England that notwithstanding the statutory provision relating to a variance between the evidence and the information, every information in a summary proceeding must allege the precise offence which the evidence disclosed and that a defendant could not be convicted of any offence different from that described in the information. (See *Martin v. Pridgeon*, 1 E. & E. 778; and *R. v. Brickhall*, 33 L.J.M.C. 156). But in the case of *Hiell v. Ward* (70 L.T. 374), which was decided in the year 1894, a conviction for a different offence from that stated in the information was sustained, and the statutory provision relating to a variance between the evidence and the information was declared to have been framed to meet such cases. There is, therefore, an apparent conflict of judicial authority on the question in England. But I observe that in the case of *Hiell v. Ward*, the offence of which the defendant was convicted was one of two statutory offences which were very similar in character, and were

prohibited by legislation which related to the same subject, and it may be that the decision in that case is reconcilable with the decisions in *Martin v. Pridgeon* and *R. v. Brickhall* by construing the statutory provision relating to variance between the evidence and the information as referring to cases in which the offence stated in the information and the offence disclosed by the evidence are cognate in character, and by regarding the purport of the provision as similar to that of the statutory provisions which permit a prisoner to be convicted in the Supreme Court of larceny, upon an information charging him with obtaining goods or money on false pretences, or upon an information charging him with embezzlement. In every such case the offence in its essence is a theft, but a prisoner cannot be convicted of larceny in the Supreme Court upon an information charging him with inflicting bodily injury, and I cannot suppose that the provision in the Magistrates Summary Procedure Act relating to a variance between the information and the evidence was intended to permit a conviction for an offence disclosed by the evidence which differed as widely from the offence stated in the information as larceny differs from the infliction of bodily injury. The extent to which the provision is applicable in practice seems to depend upon the proper meaning and effect to be given to the word 'variance.' In a case in which the offence disclosed by the evidence is distinguished in legal nomenclature from the offence stated in the information by reason of a variation in the concomitant circumstances attending the committing of it, but is cognate in its nature and in the criminal quality of it, the relation of the evidence to the information may very properly be described as a variance. But evidence that disclosed an offence totally different in its nature and criminal quality and in the concomitant circumstances necessary for its perpetration, would be substantially a contradiction and disproof of the contents of the information so far as they were dependent for proof upon the facts established by the evidence; and in such a case the relation of the evidence to the information could not be legitimately described as a variance. If this suggestion as to the purport of the provision in the Magistrates Summary Procedure Act relating to a variance between the information and the evidence is correct, the result seems to be that when a defendant is before the justices upon a definite allegation of a positive offence, and the evidence adduced in support of it discloses a different offence, but one cognate in its nature and criminal quality to that which is charged in the information, the justices may proceed to a conviction, but that, if the contents of the information are such as to have misled or deceived the defendant as to the character of the evidence that would be produced against him, the justices ought to adjourn the

hearing of the case until a future day. This view of the purport of the provision seems to be in accordance with Mr. Justice *Blackburn's* construction in *Ralph v. Hurrell*. But it appears by the language used in the first section of the Magistrates Summary Procedure Act that in every case the foundation of the jurisdiction of the justices to hear evidence is a clear and positive allegation, verbal or written, of a definite offence punishable at law. If the contents of the information describe conduct which, if fully proved against the defendant, would not be a punishable offence, there is nothing before the justices to give them jurisdiction to hear evidence of an offence, and the information ought to be dismissed. I am, therefore, of opinion that the information in this case ought to have been dismissed, and if the fine imposed upon the defendant has not been paid into the Treasury, I direct a writ of prohibition to issue": *Re Sturzaker* (2 N. & S. 32).

The information upon which the applicant was convicted disclosed no offence. On application for a prohibition, sec. 187, Justices Act 1890, was urged upon the Court—"On the hearing of any information . . . no objection shall be taken or allowed to any information . . . for any defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution . . ." *Hodges, J.*, said: "In my opinion . . . I should not be justified in prohibiting simply because the information was defective, and I should say with regard to that that the objector could not take the objection, for by that section the justices could have added to, altered, amended or taken away from the information—in fact, they could have done anything they pleased with it. I cannot prohibit simply because the information is bad. On the other hand, there should be, one would naturally suppose, some limit to the power of justices in this respect. I think they should not be allowed to commit where no offence is charged, as here. I state now the ground upon which I prohibit. In my opinion, the foundation of the justices' proceedings is a charge, and although the original information might not contain a charge against the accused, nevertheless if any charge was made against him when the case came before the justices, then the justices could have dealt with it and I should have felt unable to prohibit." His Honour then read sec. 39, Justices Act 1890, and continued: "It would appear, therefore, from that section that before the proceedings commence there should be some charge. If there is no charge there is nothing in respect of which the justice can take a statement on oath of persons as to the facts. According to the evidence in this case, there was no charge before the justices. Not only was this document defective, but it gave the go-by to any charge whatever being made. Putting the document aside,

of course no charge was made ; taking up the document again, the offence it discloses does not amount to a charge upon which the justices could take evidence and commit. It seems to me this view will reconcile the present case with the principle of those cases of which *R. v. Hughes* (1 Q.B.D. 614) is an example, wherein a person is charged, and if he appears before justices—being brought there, for example, by fraud—yet, provided a charge is then and there made against him, he may be committed upon that charge. He is entitled to be charged and to know what is the charge against him, and to have sufficient time given him to prepare his defence and cross-examine witnesses, and to an adjournment for that purpose, if necessary. I shall therefore direct that a prohibition issue on the ground that there was before the justices no criminal offence charged against R.” : *De Faro v. Rankin* (25 V.L.R. 170).

Applicant was convicted upon an information under sec. 1, Police Offences Act 1890, for permitting a room to be used for gaming ; the information omitted to state an ingredient of the offence. On motion for an order to review it was contended that under sec. 146, Justices Act 1890, the Court might make such order as it might deem just, and that by sec. 147 it was provided that “ no conviction should be or be deemed to be void by reason of any defect or error in form or substance if upon the return of the order to review the Court was satisfied that sufficient grounds were in proof before the justices making such conviction on such terms as might be just.” *Cussen, J.*, reviewed the following decisions :—*R. v. Hare* ; *Ex parte Newport* (13 V.L.R. 310) ; *O’Donell v. Clementson* (27 V.L.R. 717 ; 8 A.L.R. 67) ; *O’Donell v. Gardener* (27 V.L.R. 718 ; 8 A.L.R. 81) ; *Koetsveld v. Patrick* (29 V.L.R. 152) ; *O’Donell v. Hitchin* (8 A.L.R. 27) ; *O’Donell v. Hitchin* (27 V.L.R. 711 ; 8 A.L.R. 42) ; *Molyneux v. Macpherson* (8 A.L.R. 120 ; 23 A.L.T. 228) ; *Duncan v. Harris* (21 V.L.R. 438) ; *O’Donell v. Chambers* ([1905] V.L.R. 43 ; 10 A.L.R. 224) ; *De Faro v. Rankin* (25 V.L.R. 170 ; 5 A.L.R. 261) ; *R. v. Casey* ; *Ex parte Hutchinson* (12 V.L.R. 525) ; *Cohen v. McDonough* ([1906] V.L.R. 521 ; 12 A.L.R. 447, 566) ; *Connolly v. Stenniker* (22 V.L.R. 257 ; 2 A.L.R. (C.N.) 322) ; *R. v. Call* ; *Ex parte Clarson* (3 A.J.R. 45) ; *Mackenzie v. Keller* (15 A.L.T. 82) ; *R. v. Padbury* (5 Q.B.D. 126) ; *Ex parte Glasheen* (19 N.S.W.L.R. 141) ; *Ex parte Price* (20 N.S.W.L.R. 343) ; *Fawkner v. Woodberry* (1 Tas. L.R. 12) ; *Goodwin v. Ross* (7 N.Z. Gaz. L.R. 545) ; and continued : “ These cases, so far as they go, seem rather to support the view that there would be no power to make the amendment in this case. In the conflict of judicial authorities, there being no decision of the Full Court, I must form my own opinion, and it is that where the defendant



has never been charged with an offence either in writing or orally, and the proposed amendment would raise a new allegation of fact, the Court should not on the return of an order to review, at all events without hearing or giving an opportunity to call fresh evidence, amend an alleged information and an alleged conviction based upon it, notwithstanding that the testimony given would go to show that an offence was in fact committed. It may be that, consistently with the rule which I have adopted, the amendments which were in fact made in some of the cases above referred to were properly made. I may add that I incline to the opinion that the powers of the Court to amend on the return of an order to review are not so extensive as those possessed under sec. 187 of the Justices Act by the justices at the hearing. I do not mean by this in any way to differ from the numerous cases where a conviction based upon a proper information, being wrongly drawn up, has been amended": *Knox v. Bible* ([1907] V.L.R. 485; 29 A.L.J. 23; 13 A.L.R. 352). [Note. The appeal reported in 4 C.L.R. 1462 has no reference to the statements of the law here set out.]

Defendant was charged in a Court of Petty Sessions with "causing his servant to break a certain fence of the complainant" and was convicted. The information omitted the words "unlawfully and maliciously"—they being necessary to constitute the offence under sec. 25 of 27 Vic. No. 7. It was contended, on motion for a prohibition, that the omission of the words was a variance which could be amended under the Magistrates Summary Procedure Act, 19 Vic. No. 8, sec. 9, and even if not, the objection was too late, as it should have been taken in the Court below. *McIntyre, J.*, held that "where an information discloses no offence there is no power of amendment either in the Court below or on application for a writ of prohibition; there is certainly no offence disclosed on the face of this information, and therefore the conviction is bad. I do not agree that the defect in this information is a 'variance' within sec. 9 of the Magistrates Summary Procedure Act. *Hiett v. Ward* (70 L.T. 374); *Ex parte Price* (20 N.S.W.R. 343), and *R. v. Sturzaker* (2 N. & S. 32)": *Fawcner v. Woodberry* (1 Tas. L.R. 12).

An information under the Immigration Restriction Act charged the master of a ship with being the master of a ship from which a prohibited immigrant had entered the Commonwealth, but did not allege that he was master of the ship on the day when the immigrant entered the Commonwealth, and did not specify the particular class within which such immigrant fell. *Held*, that even if these allegations were necessary, the conviction might be cured under ss. 65 and 115 of the Justices Act 1902 (N.S.W.): *Preston v. Donohoe* (3 C.L.R. 1089).

An information under a by-law was objected to on the ground that it disclosed no offence, inasmuch as it did not set out the by-law. *Held*, that

if this was a defect, it was cured by sec. 65 Justices Act. *G. B. Simpson*, A.C.J. : " Another point was . . . that the information was bad for not alleging that the charge was laid under by-law 46. Even if it were necessary to allege the by-law, the omission to do so would constitute a defect either in substance or form which would be cured by the operation of sec. 65 of the Justices Act. Under the terms of that section, if the applicant were deceived or misled in any way, or hampered in his defence, it would have been the duty of the magistrate to grant him an adjournment, if he had applied for it ; but there is no suggestion that the applicant was prejudiced in any possible way. No doubt for many years past this Court has held that an information which discloses no offence is bad, and many prohibitions have been granted on the ground of some omission or defect in the information, but we have now a decision of the High Court on this precise point in the case of *Preston v. Donohoe* (3 C.L.R. 1089, at 1096). (His Honour dealt with the facts of that case, and continued :) It was held that these defects were cured by secs. 65 and 115 of the Justices Act. In my opinion we are bound by that decision." *Cohen*, J., concurred. *Pring*, J. : " I am of the same opinion. Upon the last point I am quite clear that the defect, if any, is cured by sec. 65. The effect of secs. 65 and 115 appears to have been entirely overlooked during all these years" : *Ex parte Parkinson* (9 S.R., 174).

An information under sec. 4, Master and Servants Act 1902 charged the appellant for that he on the 9th October, 1908, without lawful or just cause, from time to time neglected to fulfil his said contract. The conviction followed the words of the information. *Held*, that the information and conviction were not bad for duplicity. *Per Simpson*, A.C.J. : " But even if the information was for more than one offence, the law says that no objection shall be taken to an information by reason of any defect in substance or form. So far as that provision is concerned, I am of opinion that it is limited to an objection taken before the magistrate, but as I hold that there is only one offence charged in this information, I need not trouble myself by considering the effect of the provision in sec. 65 of the Justices Act 1902." *Per Pring*, J. : " Even if the information were bad for duplicity, it would be cured by sec. 65, Justices Act 1902." *Per curiam* : " If the conviction were bad for duplicity under the circumstances of the case the Court would be bound, under sec. 115 Justices Act 1902, to amend it by striking out the words ' from time to time ' " ; *Ex parte Williams* (9 S.R. 140).

3. *Mode and Time of Service.*

The 80th section of 9 & 10 Viet. c. 95 provided that on non-appearance of the defendant the Judge of the County Court on due proof of service of the summons might proceed to hear the cause and give judgment, and that the Judge might subsequently set aside judgment and execution and award a new trial on terms. The defendant was sued in the County Court without any notice of the proceedings, and judgment was given against him and execution issued against him upon affidavit of due service upon him. He applied to set aside the judgment and for a new trial, which was granted on terms to which he refused to accede, and he then paid the debt and costs under protest. An application for a prohibition was refused. *Rolfe, B.* : “ The defendant reads the 80th section as if a summons must in point of fact be served upon the defendant before the Judge of the County Court has jurisdiction to try. But by the words of the statute all that is required is due proof of service—that is to say such proof as may satisfy the Judge that service has been made ” : *Robinson v. Lenaghan* (17 L.J. Ex. 174).

B. had been summoned to a Warden's Court in respect of certain matters within that Court's jurisdiction ; the summons was served by posting it on a notice board at the Court, B. being absent from the district and having no agent or attorney. Upon judgment for the plaintiff, a prohibition was sought on the ground that there was no due proof of service of the summons. But it was *held* that “ the warden had jurisdiction over the subject matter, subject to certain rules with respect to the mode of service which were incident to that jurisdiction. . . . The jurisdiction of the Warden is conferred generally by the statute (Mining Act 1904) : and it is provided that the service may be made in two different methods. It may be made by posting the summons—and it seems to me that it is part of the jurisdiction of the Warden to decide which of the modes was the proper mode. I go further. Even if he decides that personal service was impossible when it was possible, still it does not take away his jurisdiction. The proper course, in my opinion, to remedy any error which may be made by the Warden in this respect is by appeal, as pointed out by Mr. Justice *Grove* in *Barker v. Palmer* (8 Q.B.D. 9).”—*Per Parker, J.* *Burnside, J.*, said : “ . . . If the statute provided that before the warden could proceed the summons must be served personally, then undoubtedly there would be grounds for a prohibition, because the service of process would be a condition precedent to the jurisdiction of the warden to hear the case. It has been laid down for many years gone by, and it seems to me consistently with common sense, that for mere matters of procedure or

mere irregularity of procedure, prohibition will not be granted : *Moderran v. Backhouse* (7 W.A.L.R. 39). [Affirmed by the High Court, 1 C.L.R. 675.]

Prohibition to County Court before hearing, on the ground that service of the summons was insufficient ; the summons had been left at a particular house, but that house was not the house of defendant. But, *Maule, J.* : “ It has already been decided that the Judge of the Court is to determine whether the service of the process has been sufficient.” *Williams, J.* : “ It has been decided that the proper course in such a case is for the defendant to go to the Judge of the County Court and show him that the service has been insufficient ” : *Waters v. Handley* (6 D. & L. 88).

The 11th rule of practice under the County Courts Act, 9 & 10 Vict. c. 95, required that where the service of a summons had not been personal it must be proved to the satisfaction of the Judge that the service of such summons came to the knowledge of the defendant ten clear days before the return of the summons :—*Held*, that the sufficiency of the proof of service is entirely a question for the discretion of the County Court Judge and that the superior Court will not interfere by prohibition with the exercise of that discretion : *Zohrab v. Smith* (17 L.J.Q.B. 174). See *Arnol v. Butterworth* (4 Tas. L.R. 37).

The sufficiency of service of process of inferior Courts is a question of procedure, and does not go to the jurisdiction : *O'Donoghue v. Conway* (9 W.A.L.R. 187).

A writ of prohibition will not be issued to restrain a Judge of the Court of Insolvency from proceeding upon a debtor summons, of which a copy only has been served upon the debtor ; if service of a copy be insufficient, the remedy is by appeal. A rule *nisi* was refused, the Judge intimating that an appeal was a more appropriate remedy : *Ex parte M. S. Levy* (1 V.L.R. (L.) 271).

Information was laid against H. by two persons whom he had engaged as laborers for a term. A summons issued on 28th September, but H. started from his residence at Western Port for Melbourne on 1st October. The summons was returnable on 5th October, and was served on 4th October on H.'s daughter at his residence ; the daughter informed the process-server of her father's absence in Melbourne and that he would not return until 7th October. These facts were before the Court, but they refused an adjournment and gave judgment against H. in his absence for such a sum that he could not appeal. After H.'s return he applied for a rehearing, but was refused. It appeared that, by the express direction of the justice, no depositions were taken. The

authorities referred to were :—*Ex parte Hopwood* (15 Q.B. 121) ; *Ex parte Williams* (21 L.J.M.C. 46) ; *The King v. Simpson* (10 Mod.) ; *The King v. Mallinson* (2 Burr. 679) ; *Rex v. Johnson* (1 Stra.) ; *Mitchell v. Foster* (12 A. & E. 472). “ The Court felt constrained by the authorities to refuse prohibition ; but marked its sense of the harsh and arbitrary conduct of the magistrates by refusing them their costs ” : *In re Balcombe* ; *Ex parte Hann* (1 W. & W. C.L. 49).

An undated summons was served on the defendants, calling on them to appear at a District Court on the last Monday in February. A sitting of the Court was held on 31st Jan., and the Court was then adjourned to 8th February. The action was not entered in the list of cases for 31st January, but a special application was made by the plaintiffs, without notice to the defendants, to have the action entered on the list to be tried on 8th February. The application was granted and the case heard on that day in the absence of the defendants, and judgment given for the plaintiffs. The defendants first heard of what had taken place on the 22nd February, and forthwith obtained a rule *nisi* for a prohibition. *Williams, J.*, said : “ It was intimated in *Zohrab v. Smith* (17 L.J.Q.B. 174), and expressly decided in *Robinson v. Lenaghan* (17 L.J. Ex. 174), that under the English *Small Debts Act*, 9 & 10 Vic. c. 95, the service of a summons was not necessary to found jurisdiction : and that a prohibition would not issue although a summons had not been served at all, and judgment had been obtained in the defendant’s absence. That case turned upon the 80th section of the English Act, which is precisely similar to the 53rd sec. of the District Courts Act 1858. It was held that the meaning of the section was that the Court below had jurisdiction to hear and determine a cause *ex parte* on due proof of the service of the summons on the defendants, and that the question as to whether the summons was duly served was a question of fact entirely for the Judge of the Court below to decide upon. Mr. *Haggitt* attempted to distinguish the present case from that of *Robinson v. Lenaghan* (*ubi sup.*) on the ground that by the 35th section of our Act it is expressly enacted that a summons shall be served on the defendants so many days before the trial, as shall be directed by the rules, and that the English Act did not contain a similar section. I find, however, in the 59th section of the English Act an exactly similar provision. I am unable to distinguish the present case in any respect from *Robinson v. Lenaghan* (*ubi sup.*). The remedy of the defendants is to apply to the District Court under sec. 53 of the Act to set aside the judgment. As to the objection that the summons had no date, it is quite clear that if the Court has jurisdiction without a summons having been served at all, the fact of a summons having been served without



a date cannot oust the jurisdiction. The rule will be discharged with costs": *Burt v. Vincent* (2 J.R.N.S.S.C. (N.Z.) 33).

Sec. 64 of the District Courts Act provides that if the defendant shall not appear, "the Judge, *upon due proof of service* of the summons, may proceed to the trial of the cause." The only evidence of service was an affidavit by a bailiff, who stated that he served the summons by delivering the same to a waiter at the Union Club. Affidavits were also handed in on behalf of the defendant, which stated that he did not live at the Union Club, and that he had never received a summons. The Judge proceeded *ex parte*, but a prohibition was refused—the mode and sufficiency of service was a matter for the discretion of the Judge of the District Court: *Ex parte Hickey* (4 S.C.R. 23).

A plaint in the County Court was issued by the applicant against one Brown, on 21st July, for hearing on 9th August, but by mistake the date of hearing was filled in as 9th July. The copy summons in that form was served. The plaintiff afterwards discovered the error, had the date corrected by the Registrar and served the corrected summons on 24th July. As the rules required service 18 days before the commencement of the sittings, the Judge ordered the case to be struck out with costs against the plaintiff. A rule *nisi* for prohibition was made absolute on the ground that the Judge had no jurisdiction to award costs. *Stawell, C.J.*, said that he agreed with *Mau v. Weightman* (3 V.L.R.C.L. 110) and added: . . . "Sec. 71 (County Courts Act 1869) allows the Judge to proceed on due proof by the plaintiff of service of the summons; it is for the Judge to be satisfied on that point and this Court will not interfere in such a case: *Robinson v. Lenaghan* (2 Ex. 333). He has not jurisdiction unless so satisfied. In the present instance the Judge was satisfied that the summons had not been duly served, and therefore he had no jurisdiction to try the cause; no section of the Act gives him power under such circumstances to do more than strike out the case; he did so, but such striking out does not fall within the sections (68, 69) giving power also to award costs." *R. v. Cope*; *Ex parte Smillie* (6 V.L.R.C.L. 366). [See No. 1078, sec. 83, 84, 86.]

By sec. 33 Resident Magistrates Act 1867, a defendant is entitled to an interval of 48 hours between the issuing and service of a summons and the time of his appearance. The summons was dated 11 Sept., requiring appearance on 1st Oct., but was not served till 30th September. Defendant not appearing, judgment for plaintiff. Sec. 50 gave jurisdiction upon proof of due service: "Here there was nothing to show that the question of service was before the magistrate and that he was satisfied therewith, but the only evidence (*i.e.*, applicant's affidavit) shows an insufficient service"—which distinguished the case from

*Robinson v. Lenaghan*. As the magistrate dealt with a defendant who was not before him, a prohibition was granted : *Gregg v. Krull* (1 N.Z. Jur. 132).

The defendants in the District Court were trustees of a Friendly Society, and were so described in the plaint and summons. A copy of the summons had been served on the secretary of the society at his place of business, but the defendants had not been served and did not appear. On verdict for the plaintiff, a prohibition was granted on the ground that the Judge only had jurisdiction to proceed on proof of service, and in the absence of proof there was no jurisdiction. *Per Stephen, C.J.* : " If however the Court had, under the 64th section (*i.e.*, of 22 Vic. No. 18, now 1901 No. 4, sec. 74) evidence by affidavit or otherwise, of the fact of service of the summons, and had rightly or wrongly decided that there had been due service, this Court could not have interfered. We have already so held in *Ex parte Hickey* (4 S.C.R. 23) " : *Ex parte Bucknell* (6 S.C.R. 96).

Service of process had been effected by leaving it with a person alleged to be the servant of the defendant. The magistrate did not decide whether or not this person was a servant, but merely that service on an agent was good. A prohibition was granted : *Ex parte Williams* (4 W.N. 133).

A solicitor stated in a Warden's Court that he appeared for all the defendants ; judgment was given against all the defendants. It subsequently appeared that two of the defendants had no interest in the property in question and had not authorised the solicitor to appear for them. Upon application for a prohibition, *Williams, J.*, refused to issue a writ. "As pointed out by *Coleridge, J.*, in *Zohrab v. Smith* (17 L.J.Q.B. 174), a writ of prohibition never issues merely because a step taken in a Court below may have been unwise or unjust, nor because we may think a decision unsatisfactory, but only because we find that the Court has exceeded or is about to exceed its jurisdiction." His Honour then *held* that if a solicitor states that he appears for defendants and there is nothing to lead the Court to doubt his statement, the duty of the Court is to go on and hear the case without further inquiry and without requiring proof of the service of process. "The warden, from what was before him, was quite justified in hearing the case and proceeding to judgment. If it is afterwards suggested that he has been misled by an untrue statement, he is the proper person to inquire whether the statement was true or not. The proper course would be to apply to the warden for a rehearing, or to apply to him to set aside the judgment as being on the above grounds irregular. Apart from the power to grant a rehearing, the warden has, under sec. 233 of the [Mining]

Act of 1886, all the powers of the Supreme Court to make any necessary order. The questions as to whether Mr. Henderson represented these two defendants and whether they were sufficiently served with process, are both questions relating to the procedure of the Warden's Court, and at any rate his decision upon them should first be taken : *Trustees of Evan Jones v. Gittins* (51 L.T. 599) ; *Zohrab v. Smith* (17 L.J.Q.B. 174) ; *Robinson v. Lenaghan* (2 Ex. 333) ; *Barker v. Palmer* (8 Q.B.D. 9). . . . For the reasons I have stated I do not think there should be a prohibition at all " : *Ah Fook v. Young* (8 N.Z.L.R. 370).

Summons and particulars of demand served in Magistrates' Court (Resident Magistrates Act 1867, sec. 10) upon the clerk to the Road Board. Counsel appeared on behalf of the Board and objected to the jurisdiction on the grounds—(1) That a body corporate was not liable to be sued in such a Court ; and (2) that there had been no sufficient service of the summons. Judgment was given for plaintiff, and a prohibition granted by *Gresson, J.*, but an appeal was allowed by the Court. The Court had jurisdiction over a corporation, and on the question of service, it was *held*, following *Zohrab v. Smith* (5 D. & L. 635), and *Robinson v. Lenaghan* (5 D. & L. 713), that the magistrate had jurisdiction to decide, and " however wrong his decision may have been in this respect, prohibition, which can only apply in cases of want of or excess of jurisdiction, is not the appropriate remedy. In the case of *R. v. Evans & Yale* (19 L.J.M.C. 151), the defendant not having been served at all, no doubt *certiorari* issued to quash the order ; but *certiorari* is only the means of bringing a question before a superior Court by way of appeal. In the present case, the defendant corporation was served, it may be (though we do not decide that point) irregularly, or insufficiently, but appeared, and thereby submitted itself to the jurisdiction of the Court to determine whether the service was sufficient. We are, therefore, of opinion that the question of sufficient service in the present case was, as a matter of practice and procedure, within the jurisdiction of the magistrate to determine, and consequently that prohibition is not the proper remedy against an erroneous judgment of the magistrate upon such a question " : *Paterson v. The Mandeville & Rangiora Road Board* (Col. L. J. 40 ; 2 N.Z.J.R. 132).

A Magistrate's Court summons was served personally on one of two defendants, who also without authority accepted service for the other defendant. The bailiff who effected service made an affidavit that he had served the summons upon the defendants (naming them) by delivering the same " to him personally." The Magistrates' Courts Act 1893, sec. 101, gives jurisdiction to the Court to proceed " upon due proof of service." *Denniston, J.*, said : " *Paterson v. The Mandeville*

and Rangiora Road Board (3 N.Z.C.A. 77 ; 2 J.R. 132) is an authority binding on me that ‘as to the question of service the resident magistrate had clearly jurisdiction to decide, and however wrong his decision may have been in this respect, prohibition, which can only apply in cases of want of or excess of jurisdiction, is not the appropriate remedy.’ That decision was founded upon *Zohrab v. Smith* (17 L.J.Q.B. 174) and *In re Robinson v. Lenaghan* (17 L.J. Ex. 174). Power is given to the magistrate under the Act of 1893 (sec. 101), as it was given in the Act of 1867 under which *Paterson v. The Mandeville & Rangiora Road Board* was decided, at the same or any subsequent day to grant a new hearing. This power is independent of the power, restricted as to time, to grant a rehearing in any case.” This decision was affirmed by the Full Court : *Finlay v. Bishop* (17 N.Z.L.R. 184).

A summons from the District Court was by defendant’s instructions served on his attorney. A verdict being found for plaintiff in the absence of defendant, the latter sought a prohibition on the ground that the statutory requirements as to service had not been complied with. But prohibition refused—the service was, *quoad* the defendant, personal service : *Ex parte Abercrombie* (11 S.C.R. 329).

Judgment was given in the District Court against the applicant in his absence upon an affidavit by a bailiff of personal service of the summons. Upon motion for a prohibition, the bailiff made an affidavit that no personal service had been effected and a prohibition was granted, it being held a condition precedent to judgment that the summons be personally served : *Ex parte Campbell* (9 W.N. 208). See *Ex parte Adams* (5 W.N. 80).

An affidavit of personal service was produced before a magistrate in a case then pending, and the magistrate convicted. The affidavit was in fact incorrect. But a prohibition was refused : the magistrate had, on the evidence before him *and in fact*, jurisdiction in the matter. Even if the service was by leaving the summons at the applicant’s abode, that was good service under sec. 63 Justices Act, 1902 No. 27 : *Ex parte Weekes* (5 S.R. 465).

A summons for debt had been served at a house alleged to be the last known abode of the defendant ; but it appeared that the complainant who served the summons, knew that the defendant was not then living at the house in question, but was in gaol. An order was made absolute for a prohibition, and, as the point had been taken below, with costs against the complainant : *R. v. Foster* (1 W.W. & A.C.L. 8).

The applicant was served with a summons in a Small Debts Court, two days before hearing, and not three days, as required by rules of that Court. Defendant did not appear, and verdict for plaintiff. On

motion for prohibition, it was objected that the proper course was to apply under sec. 22 (2) for a new trial, and that when the lower Court has full power to set the verdict aside this Court will not encourage the heaping up of expense by applications for prohibition. But a prohibition was granted as the magistrate had no jurisdiction to give a verdict in defendant's absence except upon proof of due service. *Simpson, J.*: "If evidence for and against on the question of waiver had been given before the magistrate, and he had decided that there had been such waiver, I do not think we could have granted a prohibition": *Ex parte Mimna* (16 W.N. 209).

It was *held* that where a statute requiring service of notice provides no special mode of service, personal service is necessary. The notice required by sec. 7 The Fences Statute, 1874 No. 479, must be personally served. Personal service does not necessarily mean actual service upon the individual to be served; it is enough if it be sufficiently shown that the document served has come to his knowledge: *R. v. Heron*; *Ex parte Mulder* (10 V.L.R.C.L. 314). [See No. 1092, sec. 7.]

H., as attorney and agent for C., took proceedings under sec. 32, Police Offences Act, 1901 No. 5, for the recovery of goods the property of C., and obtained an order for their delivery; there being no evidence of service of the summons, a prohibition was granted and C. ordered to pay costs: *Ex parte Fletcher* (23 W.N. 137).

A summons under s. 70 of the Police Offences Act was served on applicant on Sunday; applicant did not appear, but was convicted, and a *statutory* prohibition was granted on the ground that the magistrate had no jurisdiction to adjudicate upon the summons: *Ex parte Campbell* (19 W.N. 68).

The applicant, a resident of Victoria, was there served with a summons by his wife for having left her without means of support. Upon an order being made by the magistrate, a prohibition was granted; it was contended that the offence was an offence punishable upon summary conviction within sec. 15 Commonwealth Service and Execution of Process Act 1901, but the Court *held* that this was not so; to constitute an offence the act charged must be punishable *immediately*, but in such a case a defendant is first ordered to pay a sum of money, and is liable to punishment only upon default. A prohibition was granted: *Ex parte Charles Hore* (20 W.N. 179).

A summons in the Warden's Court was served less than eight days before the return day (see rule 3 of rules of 21st July, 1874). A prohibition was granted: *Ex parte Pearson* (13 W.N. 55).

Where a summons under the Deserted Wives and Children Act was



heard, and an order made before the return day, a prohibition was granted : *Ex parte Maguire* (19 W.N. 157).

A Local Court summons was taken out returnable on Thursday, 8th August, and served on Tuesday, 30th July ; the rules prescribe that eight days shall elapse between service and the return day, and Sunday is not included in computing the time. The magistrate gave a judgment for the plaintiff in the absence of the defendant, and a prohibition was granted. There must be service of the summons before the magistrate has jurisdiction : *Cargeeg v. Huelin* (4 W.A.L.R. 8).

Order VIII., r. 7, County Court Rules, required a summons to be handed to a bailiff 40 days before return day, and served 35 days before return day. It was in fact handed to the bailiff 39 days, and served 38 days, before return day. The Judge nevertheless proceeded, and, *on appeal*, it was *held* that the rule was obligatory and not directory, and appeal allowed. Objection was made that a prohibition should have been applied for, and that an appeal did not lie, but it was *held* that an appeal did lie, even if prohibition might also go. But *Grove, J.*, said : "But I am inclined to think that the defendant has not a remedy by prohibition. I never heard that a prohibition would lie where a question of time merely was involved. All the practice has been to the contrary. There is much in Comyn's Digest (tit. Prohibition) to show that, in general, prohibition lies where a Court has acted without having any jurisdiction whatever over the subject matter of the action. Here the County Court Judge had jurisdiction over the subject matter, subject to certain rules with respect to time which were incident to that jurisdiction. I think, therefore, that prohibition does not lie here," but that in any event the defendant had a right of appeal. *Lopes, J.*, after holding that the rule was obligatory, added : "The whole question being one of procedure it appears to me that the Judge's ruling was upon a matter of law incident to his jurisdiction, and that an appeal can therefore be brought" : *Barker v. Palmer* (8 Q.B.D. 9).

A garnishee summons was served on the company by leaving it at the office of the company with one M., who stated that he was in charge in the absence of the secretary. The service was held to be sufficient, and no point on prohibition arises in respect of the service. But the garnishee claimed that he was entitled under sec. 11 Small Debts Act Amendment Act of 1894 to at least five clear days' service. *Chubb, J.*, *held* that this was not so, and continued : "But even assuming the service to have been defective, at the most it amounts to an irregularity in the procedure and not to an excess or want of jurisdiction, which must be shown to entitle the applicant to prohibition. The case is covered by *Barker v. Palmer* (8 Q.B.D. 9), in which it was held that

prohibition would not lie where a question of time merely was involved. The High Court of Australia, in *Backhouse v. Moderana* (1 C.L.R. 675), said that the Court could see no reason to doubt the correctness of *Barker v. Palmer*. I am of opinion, therefore, that prohibition does not lie in this case. The remedy, as pointed out in *Backhouse v. Moderana*, is either appeal or new trial, if available": *Boland v. Almeni* ([1906] S.R. (Q.) 217).

Where a summons from a Local Court, issued under the Service and Execution of Process Act 1901, sec. 8, gave less time to the defendant than is required by the section, *held* that the question of time does not go to the jurisdiction, but is a mere matter of procedure. Prohibition refused: *Cadd v. Ludsei* (10 W.A.L.R. 27).

By r. 30 of rules under the Small Debts Ordinances (27 Vic. No. 21), a summons must be served in a foreign Local Court district at least ten days before the return day, and by r. 123 no part of Sunday . . . shall be included in the computation of time. . . . A summons was served on defendant which did not give the full period required by the rules for the return day. Upon judgment against defendant in default of appearance, he applied for a prohibition. *Parker, J.*, *held* the case governed by *Moderana v. Backhouse* (7 W.A.L.R. 39). . . . "The first question the magistrate had to determine was whether the summons had been properly served. He evidently decided that it had been properly served. Assuming that he ought to have decided that there had not been a proper service, still that did not oust his jurisdiction. The determination of the question whether the summons was properly served was incident to his jurisdiction over the action": *Hill v. Betrix* (7 W.A.L.R. 116).

#### 4. *Proceedings taken out of Time.*

S., who claimed to have purchased shares in a block of land, appeared before the Native Land Court on the hearing of an application by native owners of the block for partition. S. had given notice of his intention to apply for a partition on his own behalf, but the gazetted time for hearing his application had not then arrived. The Native Land Court decided that he had a *locus standi*, and made an allotment to him without waiting for his own application to come on. It was *held* by *Richmond, J.*, and affirmed on appeal, that the objection was not such as to entitle appellants to a prohibition—it was a matter of procedure and not of jurisdiction: *Poaka v. Ward* (8 N.Z.L.R. 338).

The defendant in a County Court action gave the plaintiff notice of intention to apply for a new trial. The notice gave insufficient time

as prescribed by the rules. The plaintiff gave notice to the defendant that he objected to the notice and did not attend on the application. The defendant informed the Judge of the plaintiff's objection, but the new trial was granted. A prohibition was refused. *Grove, J.* : "The ground of my decision is that there is nothing in the case to show that the question was ever brought before the County Court Judge. . . In the case of *Barker v. Palmer* (8 Q.B.D. 9 ; 51 L.J.Q.B. 110 ; 45 L.T.N.S. 480), the objection was taken and argued before the Judge, and he gave his opinion upon it. Here the County Court Judge's opinion has never been asked, and I think that before any application was made to the Court for a prohibition the Judge should have had an opportunity of hearing the question, but that step has not been taken. I do not express any opinion as to whether, after the opinion of the County Court Judge had been taken on the question, this Court would grant a prohibition or not." *Hawkins, J.* : "Here there was no attendance before the Judge of the complaining party, and no complaint was made as to the sufficiency of the notice. The proper proceeding would have been to make an application to the Judge to set aside the order as irregular and as no such application was made, the rule for a prohibition must be refused : *Jones v. Gittins* (51 L.T.N.S. 599).

Wood sued May for rent : judgment was given for May on 8th July. On 15th September, at the ensuing sitting of the Court, application was made on behalf of Wood for a rehearing. Notice of intention to make the application was served on May's solicitor immediately before the sitting of the Court and he objected to the Court that the rule as to notice of intention to apply had not been complied with. The magistrate granted a rehearing. A prohibition was refused—the magistrate had, under sec. 99, jurisdiction in his discretion to grant a rehearing, "and although I do not think that in the present case that discretion was properly exercised, no reason having been given for a non-compliance with the rule, this is not sufficient ground for prohibition. It is contended for the plaintiff that as the requirements of the rule were not complied with, the magistrate had no jurisdiction. The case of *Carter v. Smith* (4 E. & B. 696), however, cited by Mr. Cooper in argument, is an authority for showing that such a rule is merely directory and is not intended to interfere with the discretion of the magistrate."—*Ward, J.* : *May v. Clendon* (N.Z.L.R. 5 S.C. 252).

A licensee of a hotel gave due notice of his intention to apply for a renewal of his license ; he then transferred his hotel to the defendant within ten days of the holding of the Court at which the application was to be heard. The defendant could not, therefore, give the ten days' notice required by sec. 5 of 46 Vic. No. 24, yet the Licensing Court

granted his application. A prohibition was granted—the Court, in granting a license without ten days' notice being given, acted without jurisdiction : *Bourke v. McGrath* (12 W.N. 12).

Where a County Court Judge granted a new trial more than seven days after the first trial, a prohibition was granted : *R. v. Skinner* ; *Ex parte Fream* (3 A.J.R. 126).

The Regulation of Local Elections Act 1876 provides (sec. 48) that after an election a candidate and two electors . . . may make a declaration that they believe the election void upon grounds stated, and may petition for an inquiry : provision is then made for the holding of an inquiry, and sec. 49 provides “ Such inquiry shall be commenced within fourteen days after such petition is filed and the resident magistrate shall give not less than seven days' public notice of the time of holding the same.” *Stout, C.J.*, said : “ It was contended, on the authority of *Reg. v. The Justices of London* ([1893] 2 Q.B. 476) that, although the provisions of sec. 49 might be mandatory on the magistrate, still that the magistrate remained clothed with authority to do justice in the matter, as, if he could not do justice, it would not be done at all. If sec. 49 had been detached from sec. 48, and the words ‘ subject to the following conditions ’ in sec. 48 had been omitted, the above case might have applied. . . . By the insertion of these words, however, the Legislature has used language which expressly makes the commencement of the inquiry within fourteen days and the seven days' notice by the magistrate, conditions precedent to the exercise of any jurisdiction by the magistrate. . . . As, therefore, the inquiry was not commenced within the time limited and the prescribed notice was not given, I think the magistrate had no jurisdiction and that the writ of prohibition must go ” : *Bastings v. Stratford* (18 N.Z.L.R. 513).

A. and B. were candidates for the office of County Councillor. A. on the election polled three votes more than B. and the returning officer declared him elected. Within 14 days after the declaration of the poll, B. petitioned against A.'s election, on the ground that four illegal votes had been given to A. On inquiry held under the Regulation of Local Elections Act 1876, the magistrate found the allegation proved, and declared that A.'s election was void, and B. duly elected. Within 14 days after this decision, but more than 14 days from the declaration of the poll, A. in turn petitioned against B.'s election on the ground that illegal votes had been recorded for B. : the magistrate found this last allegation also true, and declared B.'s election void, and that A. was duly elected. B. applied for a prohibition on the ground that sec. 48 of the Act gave the magistrate power to hold the inquiry only if a declaration as prescribed was filed “ within fourteen days after any elec-



tion." A prohibition was granted—the second declaration was not filed within the time specified in the Act, and the magistrate had, therefore, no jurisdiction : *In re Cullen* ; *Ex parte Graham* (N.Z.L.R. 1 S.C. 38).

Sec. 60 Local Government Act 1891, which provides for appeals against rates to the County Court, enacts : " Such Court shall have jurisdiction to hear and determine the appeal in a summary way at the sittings thereof for which notice of appeal is given, or at the next following sittings, when the Judge of such Court thinks fit to adjourn the appeal to such next following sittings, and the decision of such Court shall be final and conclusive on all points." It was *held* that this section is directory and not mandatory, and that, therefore, when the Judge did not hear the appeal at the sittings for which notice was given, nor at the sittings next following, a prohibition would not lie against the appeal at another sittings to which he had adjourned the case. Where an appeal has been properly launched, the Court is bound to hear it, although the Court may have failed to comply with the directions of the Act which gives the right of appeal : *R. v. Casey* (23 V.L.R. 495).

A valuation list was made by the overseers of the parish of St. George, Hanover Square, and approved by the assessment committee of St. George's Union. The London County Council appealed against this valuation to the London Quarter Sessions, exercising the jurisdiction formerly exercised by the assessment sessions, on the ground that the totals of the rateable and gross values in the parish were too low. The appeal was entered in due time to be heard at the February Sessions, 1891, but owing to the press of business in the Court, and through no default of the parties, it was not heard before the 31st March of that year. After that date the assessment committee applied for a prohibition, on the ground that the time fixed by the Valuation (Metropolis) Act 1869, for hearing appeals had expired ; but prohibition on this ground refused—though the Quarter Sessions were subject to the same restrictions as the assessment sessions with regard to the time for hearing appeals, those restrictions did not apply in such a case, and the justices had authority to hear the appeal, although the time prescribed by the Act had expired ; although the direction as to time given by the Act was mandatory, " I do not think that if the hearing was prevented only by the difficulties of the Court itself, and the Court being unable to cope with its business, that would be a sufficient ground to prohibit the magistrates from hearing the appeal."—*Per Lord Esher* : *R. v. London J.J. & L.C.C.* ( [1893] 2 Q.B. 476).

Sec. 75 of the Native Land Court Act 1886 provided that an application for a rehearing should be made to the Chief Judge in writing within



three months after the decision complained of. Sec. 103 of the same Act, as amended by sec. 15 of the amending Act of 1889, gave power to the Chief Judge to make rules for regulating the sittings, practice, forms, and procedure of the Court and for the government of all persons acting under the Act. Rule 6 of the rules of 14th March, 1890, provided that every application, if not written in Maori, must have endorsed thereon the certificate of a licensed interpreter to the effect that the contents were fully explained to the Native before he signed it. An application made to the Court did not comply with rule 6, but it was allowed to be amended and was returned to the Court, properly amended, three days after the expiry of three months from the date of the decision appealed against. Upon objection taken, the Land Court *held* that the first application was filed within time and the second was only an amendment of the first. A prohibition was refused—mere error of procedure is not a matter for prohibition: *Rangipo Mete Paehehe v. Butler* (15 N.Z.L.R. 43).

#### 5. *Statutory Caution not Given.*

The applicant for a prohibition had been summarily convicted by a magistrate, although sec. 6 of the Indictable Offences Summary Jurisdiction Amendment Act 1900 applied to the case, and the magistrate had failed to inform the person charged of his right to be tried by a jury and to address him in the words set out in the section. The giving of this information was *held* to be a condition precedent to the magistrate's jurisdiction. *Cooper, J.*, in granting a prohibition said: . . . "Prohibition can be granted for a defect in jurisdiction, though it is not apparent on the face of the proceedings, if the defect is clearly shown to exist: *per Gresson, J.*, in *Reg. v. Bowen* (1 N.Z. Jur. 65), where the application was made under sec. 26 of the Appeals from Justices Act 1867, a section corresponding to sec. 266 of the Justices of the Peace Act 1882; see also *Wells v. Carew* (19 N.Z.L.R. 349, 358), and *Farquharson v. Morgan* ([1894] 1 Q.B. 552). Until the information required by sec. 6 was given, the magistrate had no jurisdiction. It being undisputed that the information was not given, the defect in jurisdiction is, within the meaning of the cases referred to above, a *defectus jurisdictionis* and a subject for prohibition": *Farrelly v. James* (23 N.Z.L.R. 921).

A youth, aged 14 years, was charged before justices with larceny: his father was present at the hearing, but the statement set out in sec. 2 of the Petty Offences Act, 31 Vic. No. 12, was not made by the justices, who proceeded to try the case summarily, found the prisoner guilty and

sentenced him to a term of imprisonment. A prohibition was granted by the Court (*Dodds, C.J., Clark and McIntyre, JJ.*) on the ground that, not having made the statement, the justices had no jurisdiction to try the case summarily: *Omant v. Reardon and others* (1 Tas. L.R. 97) And see *Kennedy v. Rankin* (11 N.Z. Gaz. L.R. 317).

A child was charged with an offence under sec. 26, Neglected Children and Juvenile Offenders Act, 1905 No. 16; at the conclusion of the evidence for the prosecution, the child was cautioned in the form given in sec. 41 Justices Act 1902, No. 27; no evidence being offered on the part of the child, the magistrate committed her to an institution under sec. 26 (c). A prohibition was granted: from the form of the caution given to her under sec. 41 Justices Act, the child was entitled to assume that she was to be committed for trial; consequently she was not given an opportunity to call evidence, as provided by sec. 27 of the Act under which she was charged: *Ex parte Crampton* (6 S.R. 236).

#### 6. Marine Inquiry Cases.

It was *held* that the Court of Marine Inquiry has no jurisdiction to exercise the power of suspending or cancelling a certificate unless directed so to do by the Board. Authority given by the Board to the Court to inquire into a casualty confers no authority to inquire into misconduct or incompetency: *In the matter of The Marine Board Act* 1887; *Ex parte Charles Taylor* (15 V.L.R. 287; 11 A.L.J. 23).

The Marine Board held an inquiry into the cause of a shipwreck and suspended the captain's certificate without having first received a report in writing on the case pursuant to secs. 87 and 88 of 35 Vic. No. 7. A prohibition was granted: *Ex parte Dalton* (14 S.C.R. 277).

No provision is made in 1901 No. 60 for the making of a report before the Court of Marine Inquiry holds an inquiry for the purpose of cancelling or suspending a certificate, and therefore the provisions of sec. 470 of the Imperial Merchant Shipping Act 1894, as to furnishing the holder of a certificate with a copy of the report before holding the inquiry, do not apply in N.S.W.: *Ex parte Setterfield* (21 N.S.W.R. 331; 17 W.N. 174). But see *Ex parte Dykes*; *In re The Victoria Steam Navigation Board* (3 V.L.R.C.L. 162).

The Marine Board has no jurisdiction to direct the Court of Marine Inquiry to investigate at one and the same time, charges against a certificated master of a steamship and against a pilot, being the persons in charge of the respective vessels that came into collision. Where such charges are heard together, the consent of the parties that they

should be so heard cannot give jurisdiction. A rule absolute for prohibition was granted : *In re Forbes & Marine Board of Victoria* (24 V.L.R. 124 ; 19 A.L.T. 254 ; 20 A.L.T. 140 ; 4 A.L.R. 148).

E.'s license as a pilot was suspended by the Court of Marine Inquiry. A prohibition was sought on several grounds :—1. Counsel for the Marine Board called E. as a witness, and, in spite of objection, the Court compelled him to give evidence. This the Court was *held* entitled to do—he was a competent and compellable witness ; the penalty was not a fine or imprisonment, and he could have refused to answer questions which might incriminate him under other sections of the Act. 2. It was also objected that the Court had before it the finding of the Board on the inquiry ; but this was not in fact so, and, even if it was, that fact would not have vitiated their decision. 3. The Court could only hold the inquiry on the direction of the Board. It was objected that the Board which held the first inquiry was improperly constituted, but this was *held* immaterial, as the Board could direct an inquiry by the Court even without holding a previous inquiry. 4. It was also *held* that the inquiry was in fact conducted in strict accordance with the Act and rules, and that the Board had a right to appear by counsel before the Court : *In re Emmerson* (23 A.L.T. 10 ; 27 V.L.R. 56).

#### 7. *Industrial Arbitration : No Dispute.*

The Industrial Arbitration Court was restrained from dealing with an application by a union of employees for regulation of conditions of employment, there being no dispute between the employers and any employees who were members of the union : *Colliery Employees' Federation v. Brown* (3 C.L.R. 255). And see *Frieze v. Court of Arbitration* (11 W.A.L.R. 18).

#### 8. *Statutory Proof not Given.*

A Marine Board inquiry was held into a collision between two ships ; after the inquiry the secretary wrote to the mate of one of the ships that the Board found him in default, and called on him to show cause why his certificate should not be suspended ; the secretary also sent him a copy of the evidence given at the inquiry. At the second inquiry, at which the mate attended to give evidence, the Board acted on the evidence given at the first inquiry, and the mate had no opportunity of cross-examining the witnesses. Upon the mate's certificate being cancelled a prohibition was granted : the Navigation Act (41 Vic. No. 3) required witnesses to be examined at this inquiry, and, as this was not done, the Board acted without jurisdiction : *Burrey v. Marine*:

*Board of Queensland* (4 Q.L.J. 151). And see *Breedon v. Gill* (5 Mod. 271); Bac. Abr. Prohibition (I.); Com. Dig. Proh., F. 13; *Nixon v. Forbes* (S.M.H., 13th July, 1858).

A summons had been issued under sec. 8 Infants' Protection Act, 1904 No. 27. Upon the case coming on at the Children's Court, an objection was taken that the magistrate had no jurisdiction to proceed, inasmuch as there had been no corroborative evidence given to support the application for the issue of the summons. A rule *nisi* for a prohibition was granted upon that ground, and objection was taken that prohibition would not lie against the issue of a summons under sec. 8, and that in any event it could go only to the magistrate who issued the summons, as it is not the duty of the magistrate who hears the summons to enquire whether the summons was properly issued: *Ex parte Jackson* (22 W.N. 30). *Pring, J.*, held that a prohibition might be granted upon the issue of the summons, and added: "I did not decide in *Ex parte Jackson* that the second magistrate is bound to proceed with the case. What I held in that case was that he need not inquire into the validity of the summons. If it is shown that the summons was issued without jurisdiction, he ought to stay his hand": *Ex parte Thew* (23 W.N. 122).

By 24 Vic. c. 10, sec. 5, the High Court of Admiralty has jurisdiction over a claim for necessities supplied to a ship elsewhere than in the port to which the ship belongs, *unless it is shown to the satisfaction of the Court* that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales . . . And by 31 & 32 Vic. c. 71, sec. 3 (2) a County Court having Admiralty jurisdiction has jurisdiction as to necessities up to £150. Necessaries were supplied to a ship in the port of B. (not the port to which she belonged), and a suit was instituted in the County Court in respect of those necessities, and judgment given for the amount claimed. The owner, who was domiciled in England, but was abroad at the time of the suit, applied for a prohibition, but it was refused—to obtain prohibition he must show to the Court before it pronounces judgment that he was domiciled in England. "The County Court Judge had jurisdiction over the subject matter unless a certain plea to the jurisdiction was set up, and that plea was not set up. . . . I may add that an additional reason why the objection must be raised before judgment, is that the domicile of the owner might be a disputed fact, which the Judge would have to decide while both parties were before him."—*Cockburn, C.J.*, in *Ex parte Michael* (L.R. 7 Q.B. 658).

Information to recover premises under Tenements Recovery Act showed that applicant was a tenant on sufferance. Evidence showed



that defendant had got into possession on sufferance. Prohibition was sought on the ground that there was no tenancy between the parties, as required by the Act. Prohibition granted. There must be a tenancy, otherwise there is no jurisdiction under the Act; here there was no such assent as is necessary to create a tenancy: *Ex parte Hubbard* (Tarl. T.R. 172). And see *Ex parte Wood* (6 W.N. 78); *Ex parte Gruer* (8 W.N. 44); *Town v. Stevens* (17 N.Z.L.R. 828); *Jones v. Owen* (5 D. & L. 669).

Defendant in the District Court had judgment against him in slander, and became insolvent. A District Court Judge thereafter issued a *ca. sa.* against him on the ground that he had "means" within sec. 87 District Courts Act. A prohibition was granted (*Hargrave, J.*, diss.) on the ground that there was no evidence before the Judge that defendant had means. The only power which the Judge has to issue a *ca. sa.* is under sec. 87, and unless there is some evidence of means within that section no order can be made. *Hargrave, J.*, took the view that there was some evidence of means before the Judge, and that the Court could not interfere: *Ex parte Gee* (6 S.C.R. 355).

Application was made for a prohibition to restrain the Local Court from proceeding on an order for the committal of a debtor for non-payment of a debt on the ground that there was no evidence of means. Sec. 130 of the Local Courts Act 1904 gives jurisdiction to commit in certain cases, "provided that such jurisdiction shall only be exercised where it is proved to the satisfaction of the magistrate that the person making default either has . . . means to pay the sum . . . and has refused . . . to pay the same." *Rooth, J.*: "The magistrate had jurisdiction to commit, but if he committed without any evidence at all he would be exceeding that jurisdiction, and this Court would prohibit him; also if it could be proved to the satisfaction of this Court that the evidence was of such a character that the magistrate could not, acting as a reasonable man, have been satisfied that a person who had means to pay, had refused, in that case again this Court might perhaps have said that the magistrate was acting in excess of his jurisdiction, and therefore the prohibition must lie." *Held*, on the facts, that there was evidence on which the magistrate could reasonably act, and prohibition refused: *Woods v. Watermann* (10 W.A.L.R. 75); *Ex parte Jordan* (19 N.S.W.L.R. 25); *Searl v. McArthur* (11 N.Z. Gaz. L.R. 179).

An affidavit in support of an application for leave to issue a judgment summons out of the district in which judgment had been obtained, stated that defendant lived in a house apparently of the yearly value of £60, and carried on business as a builder, but it did not state any circumstances showing that the business was profitable, or that the defendant



had means to pay, nor did it state whether the defendant was married, and, if so, whether he had any children. The County Court Judge gave leave to issue the summons. A prohibition was granted—the affidavit was not in accordance with Form 52A of Appendix H. to the County Court Rules 1889, and was, therefore, insufficient to give the County Court Judge jurisdiction under Order XXV., r. 14a of those rules: *McIntosh v. Simpkins* ([1901] 1 K.B. 487). And see *Lumley v. Osborne* ([1901] 1 K.B. 532); *Alderson v. Palliser* ([1901] 2 K.B. 833); *Wilson v. Gray* (7 W.A.L.R. 95); *Karim v. Rhail* (7 W.A.L.R. 127); *Howorth v. McBeath* (2 Macassey 653); *McGregor v. Beswick* (N.Z.L.R. 3 S.C. 83).

A plaint was entered in the Local Court for a sum claimed to be due for goods sold. An affidavit verifying the debt was filed in accordance with the Local Courts Act 1904, sec. 41, and a default summons was issued. The affidavit was informal in certain respects, and a prohibition was moved for on the ground that a condition precedent to the exercise of jurisdiction had not been fulfilled, inasmuch as the affidavit was by reason of such defects a nullity. The Court was of opinion that the defects amounted to no more than irregularity; the jurisdiction, being complete on the issue of the plaint, could not be affected by anything that happened afterwards: *Clancy v. Behrend* (9 W.A.L.R. 170).

A. was ordered under sec. 3 Imprisonment for Debt Statute, 1865 No. 284, to pay a certain sum of money or be imprisoned. A. was duly served personally with the summons, but did not appear; upon proof of such service and of payment of sufficient expenses and of service of the original order for payment of the debt, justices made the order. A prohibition was sought on the ground that it was not shown that the money remained due at the time the summons was heard, but was refused; such proof is not a condition of jurisdiction where the defendant fails to attend. The order drawn up erroneously recited that it was proved that the debt was *still* due and owing; but this statement was unnecessary, and so did not affect the validity of the order: *R. v. Short*; *Ex parte Hughes* (9 A.L.T. 109; 13 V.L.R. 719). [But see No. 1100, sec. 22.]

Under sec. 72 of the Licensing Act, a licensee cannot be convicted of an offence unless the evidence establishes the commission of such offence and such evidence appears on the depositions: *Ex parte Whelan* (8 W.N. 50).

#### 9. *No Depositions Taken.*

A prohibition was granted to restrain justices from enforcing an order of commitment on a fraud summons, on the ground that the

evidence given on the hearing of the summons was not taken down in writing as required by No. 284, sec. 9 : *Regina v. Harker* (5 W.W. & A.C.L. 40). And see *In re Balcombe*; *Ex parte Hahn* (1 W. & W.C.L. 49).

A prohibition was granted where on the hearing of a fraud summons, the examination of the debtor was not taken in writing: the omission invalidates the commitment, though the omission be made at the debtor's request—Act No. 284, sec. 9 : *R. v. Shelley*; *Ex parte Jones* (9 V.L.R.C.L. 297). And see *Ex parte Lawler* (19 W.N. 12). [See No. 1100, secs. 22, 25 ; *Schultz v. Ah Ling* (24 V.L.R. 932).]

In a case under the Master and Servant Act, 20 Vic. No. 28, justices made an order in favour of complainant, but added a further order which they had no power to make. A majority of the Court amended the defective part of the order, but *Martin, C.J.*, refused to amend because no depositions had been taken, and added : “ I think there ought to be depositions and if their absence had been taken here as a ground for objection, I should have held that ground to be fatal ” : *Ex parte Williams* (14 S.C.R. 268).

Where an information under sec. 2, Tenements Recovery Act, did not show that the proceedings were taken under that Act, the magistrates made no minute or order of their decision, and no depositions were taken, a prohibition was granted. It was not asked for on the last ground, but the Court dealt fully with that objection. Sec. 12 of 14 Vic. No. 43 enacts that “ . . . if . . . the Court after enquiring into the matter and *consideration of the evidence adduced before the justice or justices* shall think that the conviction . . . cannot be supported the Court . . . may . . . direct that the writ . . . be issued and may make such further order in the premises as shall be just . . . ” Sec. 15 provides that parties interested are entitled to have a copy of the information and *depositions* ; and sec. 10 provides that where the evidence appears by the depositions to support the decision, power of amendment is given. As the magistrates had not taken depositions, they had not fulfilled their statutory duty, and “ if a prohibition had been asked for on the ground that no depositions had been taken, it would have been the duty of the Court to direct it to go.”—*Per Windeyer, J.* : *Ex parte Wood & Wife* (6 W.N. 78).

It is no ground for prohibition that written depositions were not taken on the hearing of a bastardy summons. *Ex parte Wood* (6 N.S.W. W.N. 78) dissented from : *Mulheisen v. Blott* (8 W.A.L.R. 170).

But it is not necessary under the Infants' Protection Act, 1904 No. 27, that the corroborative evidence as to paternity required by sec. 4 before the issue of a summons, should be reduced into writing and sworn as a deposition : *Ex parte Anderson* (5 S.R. 448).

10. *Court Wrongly Constituted.*

A case was adjudicated upon by two justices, neither of whom had been present throughout the whole proceedings. A prohibition was granted—this was a plain violation of sec. 12, The Justices of the Peace Statute 1865: it was not incumbent on the Court to determine whether the decision was right or wrong; such an express enactment could not be disregarded—certainly not without the consent of the parties: *R. v. Marsden*; *Ex parte Corbett* (4 V.L.R.C.L. 30). [See No. 1105, sec. 58.]

A case should, under 17 Vic. No. 3, have been heard before two justices; one justice sat and heard part of the evidence and, on a subsequent day, it was heard by the same justice and the police magistrate, the depositions previously taken before the one justice being read over. Upon conviction, a prohibition was granted. *Markey v. Murray* (2 Q.L.J. 7).

But where two justices were empowered by statute to exercise summary jurisdiction, the jurisdiction was not taken away by reason of the fact that a third justice concurred in the sentence without having heard the evidence: *Ex parte Green* (5 S.C.R. 110).

A police magistrate left the bench to give evidence in a case before him, his place being taken by a J.P.; after giving his evidence he returned to the bench, continued the hearing of the case, and made an order. The J.P. had not heard the evidence given before the police magistrate gave his evidence. There were no other magistrates on the bench at any time during the hearing; the Act required that the hearing should be before a police magistrate or two justices. A prohibition was granted: *Paul v. Buttenshaw* (5 S.C.R. (Q.) 8).

Jurisdiction to hear a certain class of case was by statute given to two magistrates; a prisoner was sentenced by two magistrates, one of whom was not present at any former portion of the case. It was held that the prisoner was not lawfully under trial, as the whole case had not been heard by two magistrates, and a prohibition was granted: *The Queen v. Marrington* (1 S.C.R. App. 11).

Where a Court decided a matter, but the police magistrate was not a member of the Court, though he was required by statute to be so, a prohibition was granted: *Ex parte In Chun* (14 W.N. 12).

X. was a stipendiary magistrate, appointed under the Magistrates' Courts Act 1893, but had not been appointed to the charge of any district under the Act. Y. was the regular stipendiary magistrate at Port Chalmers, and no one else sat there except at his request. X. decided, on objection taken, that he had jurisdiction to hear and determine a petition under the Regulation of Local Elections Act 1876.

The Resident Magistrates' Act 1867 had given jurisdiction to magistrates only in certain districts and Courts, and this Act was repealed by the Magistrates' Courts Act 1893, which substituted stipendiary magistrates for resident magistrates, and gave them jurisdiction over the whole colony. On action for a prohibition it was *held* that X. had no jurisdiction: that the requirement of sec. 6, Regulation of Local Elections Act 1876, that the inquiry be held by a resident magistrate of the Court in which a petition is filed must be read as a reference to the stipendiary magistrate who usually exercised jurisdiction in the Court in which the petition was filed. *Per Stout, C.J., Conolly and Cooper, JJ.*, affirming *Williams, J. (Denniston and Edwards, JJ., dissenting)*: "We are of opinion that there are sections of the Act of 1893 that point out a particular magistrate as the magistrate whose duty it is to exercise the statutory jurisdiction of hearing the petition and that he is the person who 'usually exercises' jurisdiction at Port Chalmers. It may be that, if there were two magistrates equal in all respects in the exercise of such jurisdiction, the principle laid down in *Paley on Convictions* (7th ed., 53) would have applied. There may be cases in which two magistrates usually sit and exercise jurisdiction in one local Court." Judgment of majority, who *held* that there were not two magistrates "usually exercising" jurisdiction at Port Chalmers: *Graham v. Callaghan* (22 N.Z.L.R. 934).

An objection was taken that a case was not heard wholly by all the justices who signed the conviction; but two justices heard the case from end to end, and by sec. 6 of Act 17 Vic. No. 3, a conviction may be by any two justices of the Peace. A prohibition was refused: *Emmerson v. Clarke* (3 S.C.R. (Q.) 76).

Under the Local Courts Act 1904, sec. 12, the Court is to be held by a magistrate, but in case of his "illness or absence" two justices may sit. The magistrate appointed two justices to sit to hear a case, on the ground that his presence was required at another Court on the following day. It was alleged that he would by sitting late have been enabled to dispose of the preceding cases in time to take the case in question. *Held*, however, that the magistrate was "absent" within the meaning of the section, and that the Court was properly constituted: *Symonds v. Hawkins* (8 W.A.L.R. 70).

The Otago Licensing Ordinance 1865 (sec. 13) required the bench of magistrates to be constituted in a particular way; the Court being wrongly constituted, a prohibition was granted in respect of the order made: *In re Jones* (2 Macassey 780).

An appeal to Quarter Sessions was heard by the chairman alone, though the Acts 9 Vic. No. 4 and 27 Vic. No. 17 require that there shall

be at least one other justice. A prohibition was granted : *Beasley v. Wright & O'Donohue* (4 W.A.L.R. 108). Cf. *Ex parte Matthews* (5 S.R. 131).

A Commissioner under the Gold Fields Act, 25 Vic. No. 4, decided a certain dispute between parties : an appeal was made to a Court of Appeal, which confirmed the Commissioner's order—but the chairman of the Appeal Court held no miner's right, as the Act required by sec. 30. Prohibition granted to restrain the *alleged* Court of Appeal : *Ex parte Bornulph & Co.* (1 S.C.R. 326).

Four justices heard a case and were equally divided in opinion ; the two in favour of a conviction made an order fining the applicant. A prohibition was granted : *Dunn v. Boyle* (2 Q.L.J. 25).

A stipendiary magistrate was sitting in conjunction with a justice of the peace ; the stipendiary magistrate, when convicting, stated that the decision was his, his colleague dissenting. It was *held* that under The Licensing Act 1881 the stipendiary magistrate can only act as a single justice of the peace, and has no greater authority or power than the other justices. A prohibition was granted to restrain the enforcing of the conviction : *Nutt v. Bishop* (13 N.Z.L.R. 656).

A common law prohibition was refused, it being *held* that a summons for illegal detention of property (No. 265, sec. 32) may be heard by a justice other than the justice who granted the summons : *R. v. Lloyd* ; *Ex parte Allen* (2 V.L.R.C.L. 1).

A prohibition was granted on the ground that an order for delivery of property illegally detained (Police Offences Statute, No. 265, sec. 32) and an order for payment of the value and costs on disobedience of such first order must be made by the same justice : *Regina v. Call* ; *Ex parte Barber* (3 V.L.R.C.L. 346). [See No. 1105, sec. 59 (3).]

Under 34 Vic. No. 19, a Court Martial must be convened by the Governor or some person delegated by him : where such a Court was not so convened, it was *held* that they had no jurisdiction to try offences under the Act. It is not sufficient that the Governor approves it after it is convened. A prohibition was granted : *Ex parte Webster* (10 N.S.W.R. 79).

By the Marine Act 1890, secs. 181, 183, 184, 185, the Court of Marine Inquiry, in investigating a charge against a certificated master of a steamship, must be constituted by one or more police magistrates and two skilled members, such skilled members to be certificated masters of steamships ; where, therefore, in investigating a charge against a certificated master of a steamship, the Court includes an exempt master or pilot, such Court is wrongly constituted : *In re Forbes & The Marine Board of Victoria* (24 V.L.R. 124, 502).



Where a direction given by an archbishop, in pursuance of statutory authority, required a Judge of the Court of Arches to hear a matter in London, and he heard it at Lambeth Palace, a prohibition was granted : " London " could only be construed in its strict sense as the city proper of London, and though the defect could have been cured " by transferring the hearing of the cause to the other side of the water," the statutory condition must be complied with before the Court could exercise the jurisdiction conferred upon it. " Although we see that this is a matter of the purest technicality, yet, if the objection taken goes to the root of the jurisdiction, we are bound in the administration of the law to act accordingly " : *Hudson v. Tooth* (3 Q.B.D. 46).

### 11. *Miscellaneous.*

Two justices' Courts were held in different rooms, and the case against the applicant was heard in one of these rooms. The solicitor for the applicant was ignorant that a second Court was sitting, and attended in the other Court and an order was made against the applicant in his (applicant's) absence. *Held*, that there was jurisdiction to sit in the other Court and that a prohibition should not go : *Mulheisen v. Blott* (8 W.A.L.R. 170).

By sec. 88 of County Court Act, 1890 No. 1078, it is provided that a County Court Judge when he has reserved his decision, may draw up the same in writing, and, having duly signed it, may forward it to the Registrar who, upon notice given, may read it at the time and place appointed. It was *held* that a judgment bearing the Judge's initials is sufficiently signed within the meaning of sec. 88 of Act No. 1078. It was also *held* that a judgment duly signed and forwarded by the Judge during his term of office to the Registrar may be read by the Registrar and shall have the effect of a valid judgment, although the reading thereof be at a time when the Judge's term of office has expired : *R. v. Walsh & O'Brien* ; *Ex parte Dilnot* (18 V.L.R. 327). Cf. *Hoey v. McFarlane* (4 C.B.N.S. 718).

A County Court Judge at the end of a case entered an alternative judgment to take effect according as he should decide a point of law in favour of one party or the other : he subsequently wrote his decision to the Registrar, who entered the judgment in the register. The Judge had read the entry of his judgment in Court and had announced his intention to send his judgment on the point of law to the Registrar. A prohibition was granted—the decision of the Judge should have been pronounced in open Court and, as it was not, it was not a judgment at all and the entry in the register and all subsequent proceedings were

void. There was nothing to prevent the Judge from delivering his judgment on a future day : *R. v. Casey* ; *Ex parte Lodge* (13 V.L.R. 37). [But see now County Court Act 1890 (No. 1078), sec. 88.]

Where an appeal from a mining warden at Walhalla was heard by a County Court Judge in Melbourne, and the judgment given in Melbourne, a prohibition was refused—the judgment was not void by reason of the fact that it was made outside the territorial limits of the Court of the Judge : Mines Act 1900, secs. 118, 133, 254, 257 : *Coutes v. South Loch Fyne G. M. Co.* (26 V.L.R. 117).

A case was tried in a Local Court at *Clare* in December, and verdict for plaintiff for £34. Subsequently notice was served on the defendant in Clare to attend at the *Redruth* Local Court, to show cause why the judgment should not be set aside and a new trial granted. An order was made, the case was set down and postponed, and in May the magistrate made certain alterations in the order which were objected to. A rule *nisi* was granted on the ground that the summons and order for new trial were irregular, the summons having been returnable at a Local Court other than that in which the action was pending. *Hanson*, C.J., delivered the judgment of the Court .—“ In this case we are of opinion that the acts done by the magistrate were within his jurisdiction. Although, therefore, we see very great reason to dissent from the propriety of the course actually adopted, we are not entitled to interfere by prohibition ” : *Beare v. Beckmann* (2 S.A.L.R. 30).

Judgment in a County Court for £23 5s. 3d. debt, with £5 1s. 8d. costs. The bailiff seized a brick-yard, alleged to be worth £400, and Summers interpleaded and now moved for a prohibition on the ground that, the effect of the interpleader summons being to suspend the execution, the County Court ought to have directed the bailiff to retire from possession till the summons was determined. But rule on this ground refused—the bailiff's duty was to retain possession till the interpleader was determined : *Ex parte Summers* (18 Jur. 522).

A judgment being given in the County Court, certain goods were seized in execution and claimed by a third party. An interpleader summons then issued. A County Court rule requires the claimant in such a case to deliver particulars of his claim in which his address “ shall be fully set forth.” The claimant set out his address as *Elizabeth Street*, Islington, whereas it was in fact *Elizabeth Terrace*, Islington, and the County Court Judge decided that the claimant's address was insufficient and dismissed the claim. *Parke*, B., granted a prohibition in the original plaint : “ the jurisdiction to proceed with the execution in the original suit was taken away by the claim constituting the interpleader action, and that ought to have been determined. . . . After

he has decided the interpleader an application may be made to set aside the prohibition": *Ex parte McFee* (9 Ex. 261).

A seaman sued his captain for wages, and had an order; but a common law prohibition was granted on the ground that under sec. 166 Merchant Shipping Act 1894 the magistrate had no jurisdiction to hear and determine the complaint as it appeared from the ship's articles, which were put in evidence, that the seaman was to be discharged in the United Kingdom, and there had been no discharge with the master's written consent: *Ex parte Brown* (19 W.N. 193).

It is a condition precedent to the exercise of jurisdiction by the County Court in friendly society matters, that the requirements of 18 & 19 Vict. c. 63, sec. 44, requiring that in case of societies the rules of which have not been certified, a copy of the rules shall be deposited with the Registrar, should be complied with: *Smuth v. Pryse* (7 E. & B. 339; 26 L.J.Q.B. 95).

By sec. 41 of 18 & 19 Vict. sec. 63, the County Court has jurisdiction to settle disputes between friendly societies on the application of persons interested. *Held*, that it was a condition precedent to the jurisdiction that the applicant should be a person interested: *Hull v. McFarlane* (2 C.B.N.S. 796).

The Admiralty Court entertained a suit for limitation of liability: a prohibition was granted as the Court had no jurisdiction, inasmuch as neither the ship nor the proceeds were under arrest at the time of the institution of the suit (see sec. 13 of 24 Vic. c. 10): *James v. London & S. W. Railway Co.* (L.R. 7 Ex. 187; and on appeal at p. 287).

Prohibition to the Cinque Ports where they issued Admiralty process on a Chancery bill—"it was denied that they could thus confusedly hold plea, though it was alleged to be the practice there to do so": *Ting v. Merewether* (1 Sid. 355).

The Judicial Committee of the Privy Council on appeal reversed a decision of the Consistory Court, and retained the principal cause to which they directed applicant to appear absolutely, and applicant sought a prohibition, but rule refused: "Whether they are right in so decreeing or not is a question of practice, not of jurisdiction. The temporal Courts cannot take notice of the practice of the Ecclesiastical Courts, or entertain a question whether, in any particular case admitted to be of ecclesiastical cognisance, the practice has been regular. The only instances in which the temporal Courts can interfere by way of prohibiting any particular proceeding in an ecclesiastical suit are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the Court": *Littledale, J.*, in *Ex parte Smyth* (3 A. & E. 719; 2 C.M. & R. 748).

By letters patent appointing a chancellor for a diocese, the bishop gave him power to determine certain causes "nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment." A suit was promoted for the removal of certain ornaments of a church in the diocese, and the respondents in their answer asked that the bishop should first be consulted and his consent had and earnestly craved his judgment. The chancellor heard the suit and pronounced an order, in which it did not appear that he had first consulted the bishop or had his consent. A prohibition was refused: the chancellor's jurisdiction was not gone. "At the most it seems to me that he may have used the wrong procedure in the Court. There are many cases in which a Judge acts perfectly within his jurisdiction and yet he may adopt the wrong procedure; and if he does adopt the wrong procedure, there is a recognised way of putting him right, and that is by way of appeal; and if there be a proper remedy by appeal, then there is no right to a writ of prohibition."—*Darling, J. Channell, J.*, also *held* that this was, if anything, a defect of procedure for which prohibition does not lie: *R. v. Tristram* ([1901] 2 K.B. 141).

A clergyman was charged with illegal practices, and the Court of Arches found him guilty, suspended him *ab officio* for six weeks, and admonished him to abstain from the practices in future. Upon disobedience of the monition, he was called before the Court again, declared guilty of contumacy, and suspended for three years. He sought a prohibition on the ground that the Court had no jurisdiction to add this further punishment to his previous punishment, and that a separate charge should have been laid against him for a new offence. *Cockburn C.J.*, and *Mellor, J.*, granted a prohibition, but *Lush, J.*, dissented, and on appeal, *Lord Coleridge, C.J.*, *James* and *Thesiger, L.JJ.*, upheld the appeal, *Brett* and *Cotton, L.JJ.*, dissenting. *Lush, J.*, *held* that the procedure adopted was not contrary to the Church Discipline Act, and was inclined to think that it was in accordance with the established practice of the Court, and added: "I think that we have no jurisdiction to inquire whether the ordinary course of procedure has or has not been followed in this case. The practice and procedure of every Court where no Act of Parliament intervenes to regulate it . . . is within the exclusive cognisance of the Court itself. If in a particular case the mode of proceeding were shown to be ever so irregular and at variance with the ordinary practice it would not give this Court jurisdiction to interfere. Irregularity of procedure is matter of appeal, not prohibition, and the appeal is given to the Privy Council, not this Court": *Martin v. Mackonochie* (3 Q.B.D. at 739). On appeal, *Thesiger, L.J.*, in



4 Q.B.D. at 730, 731, after stating that ecclesiastical law and practice had been duly followed by the Court of Arches, said : “ But upon the assumption that no statutory provision is violated, it appears to me further that the proceedings would not have been properly the subject of a writ of prohibition, even if they have not been warranted by ecclesiastical law and practice . . . The mode in which that suit is to be conducted, the sentence which it is open to the Judge to pronounce, and the means by which that sentence is to be enforced, are all, in the absence of statutory provisions relating to these matters, to be regulated by the practice of the Court itself, in respect of which, if the Judge errs, appeal and not prohibition would be the proper remedy. . .” *Martin v. Mackonochie* (3 Q.B.D. at 739).

A suit was instituted in the Court of Arches for unlawful practices in the performance of divine service. A sentence of suspension for six weeks was pronounced, and defendant was “ admonished ” not to repeat the practices. He continued to repeat them, was summoned to the Court of Arches, but did not appear, and the dean declared that he had repeated the offences and disobeyed the monition, and pronounced him guilty of contumacy and suspended him *ab officio et beneficio* for three years. A prohibition was sought on the ground that this procedure was contrary to the statutes 53 Geo. III. c. 127 and 3 & 4 Vic. c. 86, and was a violation of the first principles of English law, in that it in effect rendered the accused person liable to be twice punished for the same offence. A prohibition was refused—it was a matter of ecclesiastical procedure alone, and was not, therefore, the subject of a proceeding in prohibition : *Mackonochie v. Lord Penzance* (6 A.C. 424). And see *Combe v. De la Bere* (22 Ch. D. at 324).

On motion for a prohibition the Court will not enter into questions as to the practice of the Ecclesiastical Courts—as whether witnesses in a suit have been examined conformably to a general order of the Court of Arches, though such order was made by virtue of an Act of Parliament : *Jolly v. Baines* (12 A. & E. 201).

A party was cited to the spiritual Court ; he duly appeared and was heard. Subsequently two decrees were made against him in the suit, but the decrees were made in his absence and without notice to him. On receiving notice of the decrees, he sought a prohibition on the ground that as the decrees were made in his absence and without notice to him, they were contrary to natural justice. But a prohibition was refused : the question was one that related to the mere practice of the Court and prohibition does not lie for mere error in procedure : *Ex parte Story* (8 Ex. 195).

An interpleader summons was issued by the Registrar and not by



the Court (sec. 34 of 10 Vic. No. 10). A common law prohibition was granted: the Act requires the process to issue from the Court: *Ex parte Workman* (12 W.N. 23).

An interpleader summons in the Small Debts Court was signed by the Registrar of the Court; it was objected, on motion for a prohibition, that as he had no power to sign the summons (sec. 34 of 10 Vic. No. 10) the parties were not before the Court so as to give it jurisdiction. *O'Connor, J.*, said: "If in this case it had been signed by him merely in his own name and of his own motion, the point taken would have been a good one. But the summons on the face of it is an order of the Court. The case, is therefore, distinguishable from *Ex parte Workman* (12 W.N. 23), because in that case it was not an order of the Court, but was issued by the Registrar. . . . The summons in this case was actually the order of the Court, because there was the direction of the magistrate that the summons should issue." His Honour further said that, if it appeared that the Registrar issued such a summons without any order being made by the magistrate, he would hold that it was worthless. *Ex parte Fraser* (20 N.S.W.R. 67). And see *Ex parte Prior* (15 W.N. 213).

A prohibition was sought on the ground that the application for a judgment summons was not signed by the judgment creditor or his agent (it was signed, *H. Mainland, p. P.G.*). *Williams, J.*, held that sec. 6 of the Imprisonment for Debt Abolition Act 1874 gives a judgment creditor an absolute right to obtain a summons calling on the debtor to appear and be examined under the Act. Nothing is said in the Act as to the steps to be taken—which distinguishes the case from *Howorth v. McBeath* (Mac. 653); no particular procedure is by the Act made a condition precedent to the exercise of jurisdiction. The fact that the creditor appeared at the hearing showed that the application was made by his authority. As the rule requiring signature by the creditor or his agent was merely directory, and it appeared that it was signed by the creditor's authority, the magistrate had jurisdiction: *Andrews v. McCulloch* (N.Z.L.R. 4 S.C. 35).

A prohibition was granted on the ground that a debtor's summons (under the Imprisonment for Debt Abolition Act 1874) was issued without leave of the Court obtained, as required by Rule 2, the debtor being resident outside the district of the Court issuing the summons: *the debtor had appeared by counsel*. *Gillies, J.*: "I think this is fatal to the proceedings in the Court below, inasmuch as that Court did not in the first instance take the necessary steps to invest itself with the jurisdiction subsequently exercised by it. Sec. 5 of the Imprisonment for Debt Abolition Act gives jurisdiction to the Court of committing

a person to prison, only subject to the prescribed rules. The case of *Howorth v. McBeath* (Mac. 653) is somewhat analogous. I was a good deal impressed with the argument that this was a mere irregularity in the procedure of the Court having jurisdiction, but I am inclined to think that it is more, and that the leave of the Court to issue the summons is necessary to give it jurisdiction": *McLean v. Kent* (2 J.R.N.S. S.C. 113).

A judgment summons under the Imprisonment for Debt Abolition Act 1874 was issued without an order of the Court. *Prendergast, C.J.*, agreed with *McLean v. Kent* (2 N.Z.J.R.N.S.S.C. 113) and did not consider that decision affected by *Andrews v. McCulloch & Mainland* (N.Z. L.R. 4 S.C. 35), "because, whilst some of the rules may very well be directory only, the language of this rule is clearly mandatory, the word 'only' being nugatory. Then, on the point as to whether the rules can go to the jurisdiction. Looking at the opening words of sec. 5, which are 'Subject to the provisions hereinafter mentioned and to the prescribed rules,' and thus finding that the jurisdiction is to be subject to the prescribed rules, I think that a rule annexing a condition to the exercise of jurisdiction is not *ultra vires*": *Kirkcaldie v. Cave* (N.Z.L.R. 5 S.C. 299).

Sec. 104 Local Courts Act 1886 requires the permission of a magistrate before a summons can be issued against a defendant without the Colony, when the cause of action has arisen within the Colony. Such a summons having been issued without leave, a prohibition was granted—the permission is a condition precedent to the issue of the summons: *Pohlner v. Pohlner* (24 S.A.L.R. 75).

Prohibition sought in a case where a summons in the County Court ought to have been issued only by leave of the Court, and the summons served did not on its face show that such leave was given—though in fact such leave had been given. But rule *nisi* refused—the summons was in the form prescribed by the rules of Court: *Waters v. Handley* (6 D. & L. 88).

M. was served with a Magistrate's Court summons on 8th August, at 9 a.m., to appear on 9th August, at 10 a.m. The summons purported to be under the hand of the Clerk of the Court, and was dated 5th August. On application for a prohibition, the magistrate made an affidavit that he was satisfied by the plaintiff that M. was about to remove out of the jurisdiction, and that he gave leave to serve the summons at any time before the holding of the Court: on 7th August the same magistrate was informed by the clerk of the Court that he had been unable to serve the summons and he then altered the date to 9th August, with leave to serve at any time before the opening of the Court. The sum-

mons was not re-signed when the date was altered, nor did it appear on its face to be a short-service summons. Defendant appeared and asked for an adjournment, but this was refused, and verdict given for plaintiff. A prohibition was granted—the question turned on secs. 32 and 33, Resident Magistrates Act 1867; if any shorter period than the usual time for service is allowed, this fact should appear on the face of the summons. “Any person served with a summons in the usual form, at a time when, on the authority of *Gregg v. Krull* (1 N.Z. Jur. 132), such service would be a nullity, would, I think, in the absence of notice, be entitled to treat it as a nullity.”—*Denniston, J.* It was contended that the summons was not “issued” by the person who signed it, but *Denniston, J.*, held that the summons was issued by the person who signed it; he was also inclined to think that a summons which is altered in a material part and not re-signed, would be irregular: *Mc Beth v. Buchanan* (7 N.Z.L.R. 731).

A judgment recovered in an action in the County Court, or a copy thereof, must be served on the defendant before the service on him of a fraud summons under sec. 83 County Courts Statute 1869, calling on him to appear and be examined—it is not sufficient that the debtor was aware or had notice of the judgment against him. Where such service was not effected, a prohibition was granted: *R. v. Casey; Ex parte Hutchinson* (12 V.L.R. 525). And see *R. v. Cookson; Ex parte Collins* (9 V.L.R.C.L. 23). [See No. 1100, sec. 15.]

A. was ordered by a justice to deliver up goods; on failure to do so, he was summoned and ordered to pay the value of the goods. It was sought to prohibit the second order on the ground that it was made before the first order was drawn up, and before a copy thereof was served on A.; but prohibition refused—the Act did not require the order to be drawn up and served as A. was in Court when it was made: *R. v. Panton; Ex parte Mau* (7 A.L.T. 66).

A prohibition was granted under sec. 117 The District Courts Act 1858, to restrain the District Court from proceeding with the hearing of an appeal from the decision of a Commissioner of Crown Lands acting under sec. 3 the Mining Act Amendment Act 1899. There is nothing, either in the Mining Act 1898 or in the Mining Act Amendment Act 1899 (which took away part of the jurisdiction of the warden and gave it to a commissioner); there is nothing in either Act giving a right of appeal from the commissioner. In any event, the Mining Act 1898 (sec. 281) gives a right of appeal subject to certain conditions, and *Mazwell on Statutes* (3rd ed. 525), lays down that “if the liberty of appealing from a decision is given subject to the fulfilment of certain conditions, such as giving notice of appeal within a certain time, a strict com-

*pliance with these provisions would be imperative, and non-compliance fatal to the right of appeal.*”—*Per Williams, J. : In re Beattie* (21 N.Z. L.R. 98).

It was *held* that under sec. 273 of the Local Government Act 1874, notice of appeal is a condition precedent to the hearing of the appeal at petty sessions, but it is not necessary that full and complete proof of the service of such notice should be given in order to give jurisdiction to the justices to adjourn the sessions. The justices have no power under sec. 273 to adjourn any particular case to another sessions, but may adjourn the sessions. An adjournment of all business of the sessions is an adjournment of the sessions itself: *R. v. Gillespie ; Ex parte The President, &c., of Bulleen* (13 V.L.R. 304). [See now No. 1893, sec. 301 (5).]

“In determining that the reduction decided upon should apply automatically in the first instance to the licenses of premises to which par. (a) of sec. 72 (2) of the Liquor Act, 1905 No. 40, applied, without taking into consideration the convenience of the public or the requirements of the localities, the Court omitted to take into consideration considerations which under the Act of Parliament calling it into existence were made essential conditions to the exercise of its jurisdiction to determine what licenses should cease to be in force, and in doing so, it assumed a jurisdiction which it did not possess. In my opinion this amounted to an excess of jurisdiction sufficient to justify the interference of this Court by the issue . . . of a writ of prohibition.”—*Per Street, J. : Ex parte South Australian Brewing Co., Ltd.* (8S.R. 361).

The applicant was charged under Act No. 11 1843, for that being the father of an illegitimate child . . . he did desert such child. Upon an order being made against him, a prohibition was granted by *Gwynne, J.*, on the ground that there was no evidence of desertion of the child; and by *Boothby, J.*, on the ground that there had been no adjudication of paternity, and that the magistrate had therefore no jurisdiction. *Hanson, C.J.*, dissented—the magistrate had jurisdiction; “he had made no order but what he would have been warranted in making supposing appropriate evidence had been given”: *Evans v. Thomas* (0 S.A.L.R. 82).

A borough council sued for cost of paving the footway in front of applicant's house and had an order. A prohibition was granted on the ground that no account of the total expenditure had been previously furnished to applicant—No. 359, sec. 317: *R. v. Marsden ; Ex parte Lazarus* (1 V.L.R.C.L. 23). [See No. 1893, sec. 540.]

S. was summoned before justices for rates due by him to a shire council, and an order was made against him. It was not shown to the



ustices that demand had been previously made on S. for the amount due (sec. 205 of Act 184). A prohibition was granted : *R. v. Thompson* (1 A.J.R. 23).

*Holt*, C.J., denied to grant a prohibition to the Admiralty Court upon a suggestion that they there refused to give to the party sued there a copy of the libel ; because the statute (2 H. 5., Stat. 1, c. 3) extends only to Ecclesiastical Courts, and not to the Admiralty Court : *Anon.* (1 Ld. Ray. 442).

A notice to fence under Act No. 479, sec. 7, proposed that the party giving it should fence one-half of the boundary and the other the other half. This was agreed to ; but the other party, discovering that his half would be more expensive, refused to proceed ; the justices made an order against the other party. A rule *nisi* for a prohibition was refused—there was a substantial compliance with the requirements of the statute sufficient to give the justices jurisdiction to make the order complained of : *Ex parte Ryan* (5 V.L.R.C.L. 173). [See No. 1092, sec. 7.]

A meeting of licensing justices was held, but no notice of the meeting had been given as required by sec. 17 of the Licensing Act 1885. The justices adjourned the meeting, and the proper notices were given and another meeting held at which an application for a certificate which had been set down for the previous meeting was heard and the certificate granted. *Held*, that the provisions of sec. 17 are mandatory, but that a prohibition should not in the circumstances be granted. *Real*, J., said : “ What could the Court do ? Bring up the certificate to be quashed and order the justices to enter adjournment and proceed with the hearing as in *R. v. Licensing JJ. of Rockhampton* (11 Q.L.J. 12) ? But nothing would be gained in this case by sending the case back, for immediately the justices’ attention was called to the omission they entered an adjournment, and did not deal with the case till the Clerk of Petty Sessions had issued the notices. . . . Assuming that the notice is a condition . . . that condition had been performed before they attempted to exercise jurisdiction” : *R. v. Emerald JJ.* ; *Ex parte Griffin* (1908 S.R. (Q.) 41).

The Land Drainage Act 1861 (24 & 25 Vic. c. 133) gave certain powers to landowners in reference (*inter alia*) to using watercourses flowing through land of other persons, and by secs. 72 and 73, a notice in the form there mentioned had to be given to the other person. Certain proceedings are allowed to be taken before magistrates, but *Jessel*, M.R., *held* that they could only decide (1) whether the proposed works would cause injury to the land on which they were proposed to be constructed, and (2) whether the injury could be fully compensated in money. They had no jurisdiction to decide upon the validity of a



“notice” under the Act or on the question whether the person served was the “owner” within the meaning of the Act. “The Magistrates’ Court, being an inferior Court, any person served with a bad notice may apply for a prohibition on the ground that there is no jurisdiction”: *Hedley v. Bates* (13 C.D. 498).

A. signed a blank transfer of his hotel license, having agreed with B. to transfer to him. The blank transfer was filled up and an application made to the bench to sanction the transfer and granted. However, before the hearing A. had notified the justices that he withdrew his application, and a prohibition was granted—after the application was withdrawn by A. (as he had a right to do) the justices had no jurisdiction: *Ex parte Laws* (Tarl. T.R. 43).

A District Court Judge ordered a new trial of a matter before him *mero motu*, plaintiff’s counsel not asking for it and defendant’s counsel objecting. Upon the new trial, no one appeared for the plaintiff and the case was struck out. It was *held*, on application for a prohibition, that though the Judge’s order was a wrong one, he had jurisdiction to order a new trial, and no prohibition could be granted: *Ex parte Holt* (1 W.N. 87).

Railway Commissioners made an order fixing the tolls to be paid to several canal companies; the effect of the order was that the B. company were thereby ordered to charge a smaller rate than their Act entitled them to receive. A railway company had guaranteed a certain income to the canal company. The railway company was not represented at the hearing and did not consent to the order or any variation of the tolls. *Pollock, B.*, and *Hawkins, J.*, concurred in granting a prohibition, because the consent of the railway company had not been obtained, and the Regulation of Railways Act 1873 gave the Commissioners no power without such consent to reduce the tolls, rates, or dues chargeable by the canal company under their Act: *Warwick Canal Co. v. Birmingham Canal Co.* (5 Ex. D. 1).

A magistrate, being sued in a District Court for something done by him as a justice, served on the plaintiff the notice under sec. 10 of 11 & 12 Vic. c. 44 (now sec. 140 of 1902 No. 27), that he objected to being sued in the District Court. Upon the plaintiff informing him that he intended to proceed, a prohibition was granted. The Court had no jurisdiction if the defendant objected to the case being tried there: *Ex parte Bolding* (3 S.C.R. 370).

The notification of a resolution carried under sec. 68 (2) of the Liquor Act, 1905 No. 40, is not a condition precedent to the jurisdiction of the Special Court constituted under the Act to give effect to the

resolution carried under the Local Option vote: *Ex parte Major* (8 S.R. 68).

The Mining Appeal Court entertained an appeal from the warden though there was no minute of the warden's decision as required by 37 Vic. No. 13, sec. 106. A prohibition to the Mining Appeal Court and to the warden was sought on the ground that there was no valid order made on which execution could issue. The rule was discharged. "We are asked to restrain the complainant, warden, registrar, and Judge from proceeding on a certain order made by the warden . . . . We cannot grant a prohibition when the warden can at any moment write the necessary order under the decision": *Ex parte Sherlock* (16 W.N. 94).

A magistrate made an order against M. to pay 5s. per week for the support of his wife and children. This order was filed in the Supreme Court, under sec. 24 Destitute Persons Act 1894, but it was not registered against M.'s land under the Land Transfer Act 1885. Thereafter M. sold his land to a purchaser for value without notice. Thereafter the magistrate issued a warrant or order to the clerk of his Court to sell this land, believing he had power to do so under sec. 24 Destitute Persons Act, which makes such orders, when filed in the Supreme Court, a charge on land belonging to a person against whom the order is made. A prohibition was granted against this order for sale: sec. 24 the Destitute Persons Act only applies to lands held by the person against whom the order is made at the time when sale is directed; the order does not bind lands in the hands of a purchaser for value without notice—they could only be bound by filing the order against the land under the Land Transfer Act. "What is being done is a proceeding under an order of the Court made by a judicial officer in his discretion and made without foundation. This being so, prohibition is, in my opinion, the proper remedy."—*Stout, C.J. Rowe v. Bishop* (5 Gaz. L.R. 373).

Upon the objection that the poll had not been previously advertised, as required by the Licensing Act, the justices had refused to act upon the result of the poll, and granted certificates to applicants for licenses. A rule called upon the justices and the holders of the licenses to show cause why a *certiorari* should not be granted, and why prohibition and mandamus and *quo warranto* should not issue. It was *held* that there should be no order for *quo warranto*. As to the rest of the application, it was *held* that the magistrates had no right to disregard the notice of the resolution sent to them. "The question now is, what is really the proper remedy here? They clearly, in disobeying the statute, have rendered themselves liable to the order of this Court. The effect of a resolution of this kind is to

limit or restrict their jurisdiction under the Licensing Act. When they had notice of this resolution that they should reduce the number of licenses in the area, it was their duty to obey the notice, not to object to or question it. It was a judicial tribunal and this was a judicial act, declared to be so by this statute, and we think that in this case *certiorari* will lie, and that it is the proper remedy to bring up, not this notice, but the certificates. Then, first, the order will be to bring up the orders which the magistrates made for the issue of the certificates, and then the certificates; and that, upon their being brought up, they be quashed by force of the rule, without further order. Then we also order that the mandamus issue commanding the justices to enter adjournments and to adjudicate on the several applications and to number the certificates; and further that a prohibition should issue to restrain the parties enumerated in the rule, that is the justices and the holders of certificates, from further proceeding. I think the magistrates have no power to go into the question of the validity of the poll: that must be questioned here" (*Lilley*, C.J., for the Court): *R. v. Yaldwyn* (3 Q.L.J. 144).

A District Court Judge ordered the twelve jurors directed under sec. 54 District Courts Act, to be summoned for the sittings, to be selected by taking every tenth name on the list until twelve were obtained. Upon the case being called on, it was objected that the jury was not properly summoned. Rule *nisi* for a prohibition refused on the ground that even if the Judge was wrong, his decision ought to have been questioned by appeal and not by prohibition. In the same case, the Registrar summoned a jury in a way different from that directed by the Judge, and also from that prescribed by 11 Vic. No. 20—this was only ascertained after trial. Rule refused—before coming to the superior Court for a prohibition, application should have been made to the Judge for a new trial on the ground of the improper summoning of the jury: *Ex parte Dunn* (Knox 293).

Application for prohibition to restrain the County Court and its officers from taking goods of defendant under *fi. fa.* The facts were that defendant had an order against him for £21 and costs, and thereafter passed through the Insolvent Court and obtained his certificate. Plaintiff afterwards issued the execution complained of. Rule refused; the remedy was to apply to the County Court Judge, the execution being irregular: *Herman v. Sheldry* (2 W.R. 455).

Applicant's certificate as a master was suspended by the Court of Marine Enquiry. The order was bad on the face of it, as it did not show that applicant was guilty of "gross" negligence, and it is only for such negligence that the Court has power to suspend the

certificate. It was necessary to the validity of the sentence that it should show that the Court found an offence to have been committed which justified a sentence. The Court may have found applicant guilty of "gross" misconduct, but it did not say so: *Re Taylor* (11 A.L.T. 23). And see *R. v. Court of Marine Inquiry* (23 V.L.R. 179); *In re Forbes & the Marine Board of Victoria* (24 V.L.R. 124).

A prohibition was sought in respect of an order made by a magistrate under the Imprisonment for Debt Abolition Act 1874: several objections were taken (1) that the order did not follow the form prescribed by the rules; (2) that the affidavit in support of the application for a summons was wrongly intitled; (3) that the order was made on 3rd October, but by an error of the Clerk of the Court was dated 29th September; (4) the amount of 15s. Court fees for the summons was included in the order, notwithstanding it had previously been paid. It was *held* by *Richmond, J.*, that none of these grounds went to the jurisdiction, that they were mere irregularities and formed no ground for a prohibition: *Cresswell v. McArthur* (12 N.Z.L.R. 730).

On complaint for illegal detention (Police Offences Act, 1865 No. 265, sec. 32) justices made an order for the amount of the value of the property and costs, without first ordering delivery up of the property. It was urged on application for prohibition, that the order was wrongly drawn up by inadvertence, and amendment was asked under Act No. 571, sec. 2. But *Stawell, C.J.*: "There appears to have been a mere inadvertence on the part of the justices. No power is given to us to remit. The order must be absolute, but without costs": *R. v. Burroughs*; *Ex parte Blackwell* (4 V.L.R.C.L. 136). [See No. 1105 secs. 59 (3), 146.]

Under sec. 22 (2) Small Debts Recovery Act, 1889 No. 13, a Court of Petty Sessions has no jurisdiction to grant a defendant a new trial unless he pays the costs of the first trial and gives security for the costs of the new trial. Where a new trial was granted without these conditions being imposed, a prohibition was granted: *Ex parte Clark* (21 W.N. 195).

Plaintiff sued in the District Court for detinue of a steer, and the judgment entered was "Judgment for return of the steer forthwith and for costs (to be settled by the clerk of the Court according to scale) and witness's expenses." Before the judgment was entered, the jurisdiction of the Court to do so, the value of the steer not having been assessed, was contested. R. 272 of the District Court Rules provided that "the judgment in detinue, if for the plaintiff, shall be for the value of the goods detained, together with a sum, to be stated in the judgment, by way of damages for the detention and costs; but it may be made part of the order that on payment of damages for the detention and costs,



and return of the goods on or before a day to be named, satisfaction shall be entered." R. 181, however, corresponded with sec. 78 of the English C.L.P. Act (17 & 18 Vic. c. 125) save that, instead of a remedy by attachment, as in r. 181, a remedy by *distringas* was given. "The judgment violates r. 272, and is not in compliance with what r. 181 assumes to be the form to be followed on entering a judgment. And, though there seem to me to be no merits in the defendant's objection to the judgment, and I am of opinion that a judgment in such a form might well be allowed to be entered by the Court; yet I can find no authority that permits it to be entered, and *I must therefore hold that a judgment has been entered that the Court had no jurisdiction to enter*. If such has been entered, then the Court can restrain the plaintiff from proceeding on it. The Court has in fact proceeded as if it had the powers of a Court of Equity. It has not, and therefore has acted without jurisdiction, and a prohibition must therefore issue. *It is not a mere irregularity*. The Court has done something which is beyond its power or jurisdiction to do."—*Stout, C.J.*: *Norrell v. Sweeney* (22 N.Z.L.R. 169).

A complaint under sec. 2 of 17 Vic. No. 10 (Tenements Recovery Act) was heard and decided by five justices, but the warrant of possession was only signed by two of them. Rule *nisi* granted on this ground—though the Court intimated that this might be made right before return by the signatures of the majority of the adjudicating justices being put to the warrant: *Ex parte Mullens* (14 S.C.R. 183).

A prohibition was sought to a Court Martial on the ground that applicant was not convicted of the crime contained in the charge. The charge was that he persuaded two men to enlist in the service of the East India Company, knowing them to be soldiers in the Coldstream regiment of Guards. In drawing up the sentence, the Court said that the evidence amounted to proof that the prisoner had encouraged and promoted the enlistment with the East India Company, which was a smaller shade of the offence described by the particular words of the charge. "Taking the whole of the case together, it is clear that there is ground to suppose that they meant to convict him of the charge. But if by the nicety which they used in framing the sentence that sentence were to be invalidated, it could not be by a prohibition, whatever it might be by a review or by an appeal. The most that can be made of it is an error in the proceedings, but we cannot prohibit on that account. . . . But it is unnecessary to discuss the sentence further; it would be extremely absurd to comment upon it as if it was a conviction before magistrates which was to be discussed in a Court where that conviction could be reviewed": *Grant v. Gould* (2 H. Bl. at 107).



An Ecclesiastical Court issued an inhibition against a clergyman for a period of three months. It was argued that two matters mentioned in the inhibition were not breaches of the monition and that if they had been away, the period would not have been so long, but any one of the breaches proved would have been sufficient to justify an order for the full period. It was urged that a prohibition should be granted on the ground that the inhibition was made in respect of the two matters which were not breaches of the monition. "That would probably be an inference contrary to the fact; but it was argued that the decision of the House in *R. v. O'Connell* (11 Cl. & F. 155) compels us to draw that inference. I do not think so. It is true that in that case the judgment was one quite within the competence of the Court to pass, and one which would have been quite unimpeachable, if a few words had been inserted on the record to the effect that the sentence was given in respect of each of the offences; which words, since that decision, have always been inserted. And it was also true that, on very technical reasoning, it was by a narrow majority held that the judgment must be arrested. But that was in a Court of Error, and there is no authority that I am aware of for saying that a similar slip in the form of a judgment of an inferior Court would amount to an excess of jurisdiction and so give ground for prohibition; and I think it would be a cause of much mischief if it were so held."—*Lord Blackburn*, in *Enraght v. Penzance* (7 A.C. at 250).

Prohibition sought against the sentence of a Prize Court. ". . . every complaint against the *sentence* must be laid out of the case. You are sitting here in a Court of Error, but your jurisdiction is now confined to the inquiry whether the ground stated in this declaration for issuing such a prohibition as that which is described in these pleadings is or is not sufficient in law. The sentence is before your lordships, as part of that ground, and the effect of it, in that view, I have already stated. But it is before your lordships as a sentence unimpeached. The complaint made to the temporal Court is not that the sentence is wrong, which, indeed, the temporal Court had no jurisdiction to correct if it were wrong, nor is the complaint that the sentence is an excess of jurisdiction, or in any other respect a ground for prohibiting the Prize Court to carry it into execution."—*Eyre, C.J.*, in *Home v. Camden* (2 H. Bl. at 546).

The Judge of the Mayor's Court awarded costs on the higher scale, but in his certificate omitted to state any ground for doing so: a prohibition was refused. "It appears to me that he was acting irregularly and contrary to the direction of the statute in not stating in his certificate the ground on which he gave it. But although in this

he was undoubtedly wrong, yet his omission was only in the nature of an irregularity in procedure, and cannot be construed into an act done without jurisdiction. This is my view, and is based on the well-established principle of law that prohibition is not to be allowed for mere errors of procedure or irregularities.”—*Wright, J. : R. v. Mayor of London* (62 L.J.Q.B. 589).

A prohibition was sought against a Mining Warden’s Court on the ground “ that the warden had no jurisdiction, inasmuch as the order did not comply with sec. 78, Mining Act.” *Darley, C.J.*, said : “ It may be that the order is defective. Looking at the section mentioned, it appears that in the ordinary course the warden gives his decision in open Court. That decision binds the parties. Afterwards the warden or his clerk, in the office, draws up the formal record of that decision, just in the same way as the Prothonotary of this Court records a decision which has been given in open Court. Once a decision is so pronounced, the Judges have no further concern with it, but the order giving effect to the decision is drawn up by the officers of the Court. It appears to me that the parties cannot be bound by any neglect of duty on the part of the person whose duty is it to see that an order is properly drawn up, whether the Prothonotary, the warden, or his clerk. I think, therefore, that the mistake is immaterial, and in the present case the order as drawn differs but little from the form given in the schedule ” : *Ex parte Wood* (4 S.R. 140).

An industrial union was fined for taking part in a strike ; the funds of the union being insufficient to meet the fine, an order was made under the Industrial Arbitration Act 1905, sec. 101, sub-secs. (f) and (g) ordering payment by individual members, the liability of any member being limited to £10. *Held*, that under the section the Court had jurisdiction to make the order in this form without assessing the amount payable by each member, but if there was an error, it was an error of procedure, for which prohibition did not lie : *Blackball Miners v. Judge of Arbitration Court* (10 N.Z. Gaz. L.R. 633 ; 27 N.Z.L.R. 905).

“ If there is an error in the judgment, there ought to be an appeal to the Court. It is a point of law whether the judgment is properly drawn up or not, on which an appeal would lie. It is not a case for a prohibition at all.”—*Faucett, J. : Ex parte Pulser* (2 S.C.R.N.S. 71).

The Native Land Court, under the 21st section of the Native Lands Court Act 1886, divided land into four portions and assigned one portion to each of four groups of natives. It was *held* that the Court should have

made four separate orders, and not one order only. "But that is a mere irregularity, and can be rectified at any time. In respect of this there might be ground for mandamus; but it is a matter which the Native Land Court would no doubt set right if asked. The writ of prohibition must be refused."—*Per Prendergast, C.J.: Paraotene v. Smith* (12 N.Z.L.R. 167).

On the hearing of a judgment summons under 34 Vic. No. 21, sec. 3, the magistrate ordered the amount to be paid within fourteen days of the order. No order was made for imprisonment and no formal order was drawn up. A prohibition was granted by the Judge in Chambers, but his order was set aside on appeal. The section of the Act enacted that "Any Court may commit to prison . . . any person who makes default in payment of any debt . . . in pursuance of any . . . judgment . . . Provided that such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default . . . has . . . means to pay . . . and has refused . . . to pay the same." The order of the magistrate directed the debtor to pay the judgment debt and 5s. witness' expenses within 14 days of the date of the order. Though no formal order was drawn up, there was a note of the order entered by the magistrate. The Court (*Stone, C.J., Parker, and McMillan, JJ.*) held that the order did not go in any way to the jurisdiction, but was, if anything, a mere irregularity of the magistrate. "It cannot be said that because he failed to make an order for imprisonment, but made an order for payment within 14 days, that that is an order which goes to his jurisdiction and a bad order. I think that if we were to allow there was sufficient ground for prohibition in this case because the magistrate had committed this irregularity, we should be called upon to grant a prohibition in the event of the magistrate not doing what the Act gives him no power to do. That is in fact what he has done in granting this 14 days to the debtor, instead of awarding imprisonment at once. That, as I said, I think is a mere irregularity, and does not go to the jurisdiction, and therefore I think the appeal in this case should be allowed": *Ashton v. Marshall* (6 W.A.L.R. 79).

In an action by a municipal district for water rates, a verdict was given for the plaintiffs for "the amount claimed less amount for six weeks when no supply given." A prohibition asked for on the ground that the verdict was uncertain was refused. It is no ground for prohibition that a verdict is uncertain: *Ex parte Crystall* (20 N.S.W.L.R. 267).

### iii. Local Limits.

Where the jurisdiction of an inferior Court is limited either to causes of action arising, or to persons resident, within a particular locality, prohibition will lie if the inferior Court purports to deal with causes of action arising or persons resident outside that particular locality.

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“The question of jurisdiction is of two sorts, the want of jurisdiction as to the subject of the suit, which can never be acquired, and the want of jurisdiction as to the locality of the parties in the suit.”—*Sir John Leach*, in *Chichester v. Donegal* (6 Mad. at 395).

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“But the want of jurisdiction may proceed, not from the nature of the subject, but because one of the parties is not locally within the jurisdiction of the special Court; and although the Court then may have full jurisdiction of the subject, it has not jurisdiction over the party, in respect of the absence of that party from the local district.”—*Sir John Leach*, in *Chichester v. Donegal* (6 Mad. at 395).

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“In all cases where inferior Courts assume a jurisdiction or hold plea of a matter not arising within their limits, the party hath his remedy and may stay their proceedings by prohibition.”—*Bacon’s Abridgement, Prohibition (K.)*.

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#### *Illustrations.*

Where a magistrate heard a petition under the Local Elections Act which was not filed in the nearest Magistrate’s Court, as required by sec. 45, a prohibition was granted: *Macnamara v. Bell* (26 N.Z.L.R. 1231).

A rule was sought to restrain proceedings in an appeal from a road rate on the ground that the Court of Petty Sessions was not the Court nearest to the rateable property on which the rate was imposed

(Act No. 176, sec. 199). The Court *held* that the words requiring the appeal to be before the Court nearest the property are mandatory and not merely directory—that they are descriptive of certain justices, and those justices only. A prohibition was granted : *R. v. McLachlan & Campaspe Road Board* (2 W.W. & A.C.L. 171). [Cf. No. 1898, sec. 301.]

Sec. 119 Local Courts Act 1886 requires every action to be commenced at the Court nearest to the place where the cause of action arose, or where the defendant dwells or carries on business. A contract was made at Mt. Gambier, and the breach at Narracoorte. As the contract as well as the breach formed part of the cause of action, the action was admittedly not brought at the Court nearest which the cause of action arose ; neither was it brought at the Court nearest which the defendant dwelt or carried on business. A prohibition was granted : *Ellis v. Butler* (21 S.A.L.R. 136).

A prosecution was instituted against the applicant under the Liquor Act, 1898 No. 18. Sec. 107 of that Act prescribes that offences must be prosecuted at the Court of Petty Sessions nearest to the place where the offence was committed. It was proved that the Court in which the prosecution was instituted was not the nearest Court to the place where the offence was committed, but the magistrates convicted the applicants. A prohibition was granted : *Ex parte Davoren* (6 S.R. 270).

A prohibition was granted in respect of an order by justices under the Masters and Servants Act 1861 (25 Vic. No. 11), inasmuch as the proceeding was not taken at the Court nearest to the place at which the matter arose : *Tooth v. Spiro* (4 S.C.R. (Q.) 155 ; 1 Q.L.J. 27).

The payee of a promissory note payable on demand sued the maker in the Local Court at Adelaide. The note was signed at Nackara (within the territorial jurisdiction of the Local Court at Terowie). A prohibition was granted—the whole cause of action, everything material for the plaintiff to prove, must have arisen within the jurisdiction of the Court in which the defendant was sued in order to give that Court jurisdiction ; the whole cause of action did not arise at Adelaide, nor did the original debt arise there, nor did the correspondence put in evidence contain any admission of an account stated : *Brown v. Brown* (21 S.A.L.R. 140).

The cause of action—that is the whole substantial cause of action—must arise, and the garnishee must reside or carry on business within the city of London, in order to give the Lord Mayor's Court jurisdiction to attach moneys, &c., of the debtor in the hands of a garnishee. The defendants (who had no residence or place of business in London) drew bills in Philadelphia upon the Union Bank of London, and endorsed them in Philadelphia, and there delivered them to the agents of the



plaintiffs, who remitted them to the plaintiffs in London. The drawers refusing to accept the bills, the plaintiffs issued an attachment out of the Lord Mayor's Court to attach moneys of the drawers in the hands of the garnishees, bankers in London. *Held*, that the "cause of action" arose in America and not in London, and consequently that the garnishees were entitled to a writ of prohibition : *Cooke v. Gill* (L.R. 8 C.P. 107).

Bills of exchange were drawn and accepted abroad and indorsed by the defendant abroad, one of them being payable at London, the others in Liverpool. The plaintiffs, having no residence or place of business in London, as indorsees of the bills, sued the defendant (who likewise had no residence or place of business in London) in the Mayor's Court and attached moneys of the defendant in the hands of a garnishee, a banker in London. A prohibition was granted—neither the plaintiffs nor the defendant resided in London, and, further, the cause of action did not arise wholly in London : *Banque de Credit Commercial v. De Gas* (L.R. 6 C.P. 142).

A. sued B. in the Mayor's Court, London, as drawer of two cheques upon the Huddersfield branch of the Midland Banking Company. In answer to a rule for a prohibition, it was sworn that the cheques were drawn and indorsed by the payee to A. in London, that the drawer had no effects in the hands of the Midland Banking Company, and that he had long since had notice from the bank that cheques drawn by him would not be paid unless previously provided for. *Held*, that there being no obligation on A. to prove presentment and dishonour, there was no ground for a prohibition : *Wirth v. Austin* (L.R. 10 C.P. 689).

Prohibition sought to restrain action on a bill of exchange in the County Court ; the defendant did not reside within the district of the Court, and sec. 60 of 9 & 10 Vic. c. 95 provided that a summons might issue by leave of the Court for the district "in which the cause of action arose" ; it was urged that bills of exchange could not be said to be of any place, and therefore the cause of action on them did not arise within any particular Court. But *Maule, J.* : "There is no doubt that bills of exchange come within the jurisdiction of the Court. Although the venue cannot be changed in an action upon a bill of exchange on the common affidavit, because the contract is *nullius loci*, that does not interfere with the jurisdiction of the County Court" : *Waters v. Handley* (6 D. & L. 88).

A judgment was recovered by plaintiff in China against the defendant, and an action brought upon that judgment in the Queen's Bench, in which judgment was signed by default. That judgment being signed at the Temple, it was urged that the Mayor's Court had jurisdiction in

an action upon it—but the writ in the Queen's Bench action was tested before the Queen ; all that is done in Court is before the Court at Westminster. A prohibition was granted to the Mayor's Court : in point of law, all the proceedings took place at Westminster (*i.e.*, in Middlesex, and not in London) : *Tapp v. Jones* (L.R. 9 C.P. 418).

The Police Offences Act, 19 Vic. No. 24, sec. 10 (now 1901 No. 5, sec. 32), only applies to proclaimed towns. Where an order was made for return of goods detained in a district not proclaimed a prohibition was granted : *Ex parte Clarke* (7 S.C.R. 146).

The executor of a will having renounced probate, the applicant took out letters of administration *c.t.a.* The respondent, a legatee, sued the applicant in the County Court for the amount of the legacy. The applicant did not reside within the jurisdiction of the County Court, and the letters of administration were not taken out within the local jurisdiction of the County Court. *Held*, that the grant of the administration was part of the cause of action and that the cause of action did not therefore arise within the jurisdiction and a prohibition was granted : *Fuller v. Mackay* (2 E. & B. 573).

A. lent a mare to C., at Isisford, C. undertaking to return her to A. at that place. C. did not return her to A. at that place. C. did not usually reside within the district of Isisford, and, upon being sued in the Small Debts Court there for *unlawful detention*, set up that he did not reside nor did the cause of action arise within the district of Isisford. Upon judgment for the plaintiff a prohibition was granted by *Power, J.* The plaintiff could have sued at Isisford if his complaint had been founded on breach of contract ; but the wrong called detention is the act of keeping the thing in the place where it is, and the detention therefore took place beyond the jurisdiction of the Court. On appeal, the Full Court adopted this view, but allowed the appeal on the ground that the defect was merely a technical or apparent want of jurisdiction : *R. v. Justices at Isisford* ; *Ex parte Armstrong* ([1902] S.R. (Q.) 250).

Prohibition to restrain the Admiralty Court from trying an action on an agreement not made at sea : *Palmer v. Pope* (Hob. 79) ; *Bushel v. Jay* (1 Keb. 153).

A. sued B., in the Mayor's Court and had a verdict for £96, and B. sought prohibition on the ground that the contract sued upon and the breach both arose out of the jurisdiction. It was *held* that the Court had no jurisdiction, the action being for more than £50, unless the *whole* cause of action arose within the jurisdiction : *Heyworth v. Mayor of London* (1 Cab. & Ell. 312).

The applicant was convicted of an offence under sec. 9 of the Children's Protection Act 1902. The evidence showed that the offence was

committed at Camperdown. A prohibition was applied for on the ground that there was no evidence that the offence was committed in New South Wales. *Per Darley, C.J.*: "If the applicant's contention were correct, it would be necessary in every case before a justice to prove that the particular matter took place within his jurisdiction. The assumption is that a magistrate does not act without jurisdiction, and it is on that presumption that sec. 20 of the Justices Act was framed. If the magistrate was acting without jurisdiction that should be made to appear. . . . It is now sought to upset the conviction on the ground that there was no evidence that Camperdown is in New South Wales. In my opinion that argument is completely disposed of by sec. 20 of the Justices Act, which is in these terms: 'In all cases every act done or purporting to have been done by or before any justice shall be taken to have been within his jurisdiction, without allegation to that effect, until the contrary is shown.' This is not a matter *inter partes*, one of whom has some claim before the Court, but it is a case in which the Crown is proceeding for a breach of the law. In *Ex parte Smith* (4 S.R. 110), it was quite clear that the magistrate had no jurisdiction unless the proceedings were taken within certain boundaries, and in that case I can quite understand that section being held not to apply, inasmuch as it had to appear on the face of the summons that the premises were within the jurisdiction. That was a matter *inter partes* where a civil remedy was sought by a landlord against his tenant and the application was made under the provisions of an Act of Parliament which requires that the land must be situated in a certain district. I think, therefore, that case is distinguishable, and that this rule must be discharged with costs": *Ex parte Martin* (21 W.N. 123). Cf. *Carbery v. Cook* (3 C.L.R. 995).

The defendant, master of a ship, was summoned to answer a charge of having assaulted the plaintiff during the voyage to England. The defendant pleaded that the Court had no jurisdiction, as the cause of action did not arise within the Colony, and made no defence on the merits. The defendant referred to sec. 97, Local Courts Act—that a defendant must be summoned to the Court nearest where he resides or the cause of action arose. *Hanson, C.J.*: "Local Courts have jurisdiction where the person is resident in the colony." Counsel then cited *Lamb v. Smith* (15 L.J. Exch. 287) as showing that a ship cannot be the residence of a person. The Court (*Hanson, C.J., Gwynne and Wearing, JJ.*) refused a rule. "The cause of action arose out of the jurisdiction; but as it is local and personal that does not prevent the Court having jurisdiction over the cause. There is a distinction between the cause of action and the cause": *Anderson v. Loutit* (2 S.A.L.R. 19).

Sec. 12 Mayor's Court Procedure Act, 20 & 21 Vic. c. 157, gives the Mayor's Court jurisdiction where not more than £50 is claimed, if *any part* of the cause of action arises in the city. The terms of sale of the lease, fixtures and goodwill of a business carried on in Surrey having been agreed upon orally, two counterpart documents were drawn up, embodying such terms. One of these was signed by the purchaser at Bow, in Middlesex, the other was subsequently signed by the vendor in the city of London. The two documents were then exchanged, and the deposit was paid at the office of the purchaser's solicitor, in the city of London. The sum of £50, part of the purchase money, being unpaid, the vendor sued for it in the Mayor's Court. *Held*, that the cause of action did not arise in part within the city, and prohibition granted : the cause of action arose upon the defendant signing the agreement in Middlesex : *Alderton v. Archer* (14 Q.B.D. 1).

Orders were given for goods at Poplar to be delivered to a carrier named by the buyer and to be paid by him. The goods were received by the carrier (on delivery orders handed to him by the seller in the City of London) partly within and partly without the city. An action having been brought for the price, *held*, that part of the cause of action arose out of the jurisdiction of the Court, and therefore the defendant was entitled to a prohibition : *Gold v. Turner* (L.R. 10 C.P. 149).

Defendant, who carried on business in London, posted a letter there, containing an order for goods, addressed to the plaintiff in Surrey. No letter was sent accepting the offer ; but the goods were taken by a servant of the plaintiff and delivered to the defendant in London. *Held*, that the contract was not completed till delivery of the goods, that the cause of action therefore arose wholly within London, and that the Mayor's Court had jurisdiction. Prohibition refused : *Taylor v. Jones* (1 C.P.D. 87).

E., the agent of Q., who carried on business at Toowoomba, obtained a verbal order for goods from F., at Warwick. The goods were made up by Q. at Toowoomba, and sent by rail to Warwick, where F. received them and paid the railage. Q. sued F. for the price in the Small Debts Court at Toowoomba. A prohibition was granted—the contract was made at Warwick, and, by the Act of 1867 the defendant must be sued either where he resides or where the debt is contracted, or where the cause of action arises : *R. v. The Justices at Toowoomba ; Ex parte Fraser* ([1902] S.R. (Q.) 203).

The Resident Magistrates Act 1867, sec. 19, gives a resident magistrate jurisdiction if the cause of action arises in some material point within the district. Therefore, where goods have been ordered from the plaintiff's traveller at a place beyond the jurisdiction of the



Court, and the order has been executed by delivering the goods to a carrier at a place within the jurisdiction, prohibition will not issue, notwithstanding that it is applied for before verdict. In this case the Judge inquired into the facts on affidavits, and concluded—"I think, therefore, on the affidavits, that if there was a delivery at all it took place at Dunedin (the district of the respondent magistrate), and that as the delivery is a material point in the cause of action, the resident Magistrate's Court had jurisdiction": *In re Oliver v. Armstrong* (2 N.Z.J.R.N.S.S.C. 212).

An order to make certain bets having been transmitted by postal telegraph from the plaintiff without the city of London to the defendant within it, he telegraphed from the city that the order had been obeyed. On action for breach of contract in the Mayor's Court, prohibition refused: the contract of agency was made in the city, and the Court had jurisdiction: *Cowan v. O'Connor* (20 Q.B.D. 640).

A mining warden at Nelson entertained a suit to set aside a lien registered on behalf of the applicant; the parties suing were mortgagees of a mining privilege, and their title as mortgagees arose from an instrument executed outside the Nelson Mining District. A prohibition was sought on the ground that the warden had no jurisdiction to set aside the lien, but it was *held* that he had jurisdiction under sec. 173 of The Mining Act 1898, although a material part of the cause of action arose beyond his district; his jurisdiction was not founded on sec. 254, which distinguished the case from *Henderson v. The Wangapeka Gold Mining Co.* (23 N.Z.L.R. 833): *Drummev v. Kenny* (24 N.Z.L.R. 792).

The plaintiff, residing at Kumara, wrote and posted to the defendant, residing at Dunedin, an authority empowering a person to be appointed by the defendant to collect money at Dunedin. The plaintiff afterwards took out a summons before the resident magistrate at Kumara, to recover moneys so collected, and judgment passed by default for the plaintiff. A prohibition was granted—the Court had jurisdiction if a material part of the cause of action arose in the Kumara district, but the writing and posting of the letter was not a material part of the cause of action: *In re Thompson v. Harty* (3 J.R.N.S.S.C. (N.Z.) 55).

Plaintiff sued in the Mayor's Court as assignee of a debt alleged to be due in respect of the price of goods sold and delivered to the defendant by the assignor. The sale and delivery had taken place without the city, but the debt had been assigned to the plaintiff (Judicature Act 1873, sec. 25 (6)) in writing in London. A prohibition was refused; the assignment of the debt was part of the cause of action and, as it took place within the city, the Court had jurisdiction. "Cause



of action " means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court : *Read v. Brown* (22 Q.B.D. 128).

A schoolboy, residing at Newcastle, bought goods of the respondents, who sent in their bill to the mother, resident at Sydney. The mother was sued in the Small Debts Court at Newcastle. On a verdict being given against her, a prohibition was granted on the ground that the mother did not reside at Newcastle, and there was no evidence of a promise to pay, or that the debt was contracted, there : *Ex parte Young* (10 W.N. 200).

Sec. 5 of the Debtors Act (32 & 33 Vic. c. 62) gives power to all Courts, including inferior Courts, to make orders and to commit to prison, not only in respect of orders or judgments of inferior Courts, but also in respect of those of the superior Courts to the extent of £50. *Held*, that the jurisdiction of the Mayor's Court, London, under the Act, is confined to cases in which the debtor is, at the time of the issuing of the summons, resident or carrying on business within its limits. Where the Mayor's Court made an order upon a defendant who resided beyond the limits of its jurisdiction—a prohibition issued : *Washer v. Elliott* (1 C.P.D. 169).

Plaintiff sued defendant in the Sydney District Court for the price of goods sold and delivered by him to the defendant in New Zealand. At the time of service of the summons, defendant was resident within the jurisdiction of the District Court. On verdict for plaintiff, a prohibition was refused. The District Court had jurisdiction by sec. 5, District Courts Act, 22 Vic. No. 18 ; cases decided under the Victorian County Courts Act have no application, because that Act has no section similar to sec. 5 of 22 Vic. No. 18, now 1901 No. 4, s. 7 (1) : *Thompson v. Hood* (5 N.S.W.R. 202).\*

A person who had resided at Albury for six weeks for the purpose of contesting a parliamentary election, and had contracted a debt there, was sued in the District Court at Albury. A prohibition was granted—he did not reside within the Albury district. " A District Court has no jurisdiction in respect of the contracting of a debt within the creditor's district unless the defendant at that time resided there ; for, if not, he cannot be said to have ' removed,' or ' become resident ' in another district." " The defendant was never personally amenable to that jurisdiction " : *Ex parte Asher* (4 S.C.R. 71).

The S.E. Railway Company have a station in Cannon-street, city, where a considerable portion of their business is transacted. Their principal station, where the meetings of the directors are held and the general and substantial business of the company is conducted, is without

\* See as to Victoria—*Crooke v. Smith*, 4 V.L.R. 1, 95 ; *Brooks, Robinson & Co. v. Howard Smith & Sons*, 16 V.L.R. 245 ; *Beecham v. Cameron*, 15 A.L.R. 598.

the city. *Held*, that the company did not "carry on business" within the jurisdiction of the Mayor's Court within the meaning of the Mayor's Court Extension Act 1857, sec. 12. *Brown v. London & N. W. Railway Co.* (32 L.J.Q.B. 318), followed. "It was there said that business must mean the general, or, as it is sometimes called, the administrative business carried on at the chief or principal station. Here, the general business of the company is not carried on within the city." A motion to rescind the order for a prohibition was refused: *Le Tailleur v. S. E. Railway Co.* (3 C.P.D. 18).

Defendants had a chief office which was also a terminal station in London, but their business was managed at Victoria Station, which was not within the city. *Held*, that they were carrying on business at Victoria Station and not in the city, and a prohibition was granted to restrain an action against them in the Mayor's Court: *Rogers v. L. C. & R. Railway Co.* (26 W.R. 192).

A company was incorporated in Scotland and had its registered office in Glasgow; it owned and was formed to work a mine in New Zealand. It had no office in the colony, but had an attorney M. in the colony, appointed by deed. G. did work for the company, and brought an action in the Magistrate's Court of the district in which the mine was situated. The plaint and summons described the defendant as "M. (attorney for the F. Co.) of Auckland," and the particulars of claim were headed "Mr. M. (attorney for the F. Co.) Dr. to G.," at the foot of which were the words "wages while working for the above company" at "the mine." The summons was served on M. At the time of the issue and service of the summons the mine was held and worked by a third person on tribute to the company. M. applied for a nonsuit on the ground that no contract was proved with him personally, but the magistrate amended the proceedings by striking out "M. attorney for," and then adjourned the case. No fresh service of the summons was effected, and at the adjourned hearing there was no appearance for M. or the company, and a judgment was given for G. A prohibition was refused—it being *held* by Conolly, J., and affirmed by the Full Court (*Richmond, Williams and Denniston*, JJ.) that the magistrate had power to make the amendment, and by the Full Court (reversing *Conolly*, J.) that the magistrate had jurisdiction over the company, as the company was *carrying on business and was therefore resident* in the district, and that service on M. was good service on the company. The resident magistrate's power of amendment under sec. 80 Resident Magistrates Act 1867 was identical with sec. 222 of the English Common Law Procedure Act 1852, and *Lord Bolingbroke v. Townsend* (L.R. 8 C.P. 645), is an authority in favour of the power to make the amend-

ment in question. The company carried on business in New Zealand—it was in direct receipt of produce of the soil and it was formed for that purpose—and a company may have two or more residences: *Guy v. Ferguson Syndicate* (10 N.Z.L.R. 405).

A summons was issued out of the Resident Magistrate's Court at Christchurch against defendants, residing out of the colony, but having a head office in Wellington, where they were represented by an agent holding a power of attorney authorising him to prosecute and defend actions. The summons was served on the agent by delivering it at the office. Objection was made at the hearing that the summons was not served in accordance with the Resident Magistrates Act 1867: the magistrate gave judgment for the amount claimed. *Johnston, J.*, while agreeing that there might be two domiciles and two jurisdictions in the case of a corporation, said: "But with regard to natural persons (not corporations) like the defendants, residence, domicile, and carrying on business are three distinct things . . . Now, inasmuch as the Resident Magistrates Act 1867 speaks in the 19th section of persons against whom claim is made residing or carrying on business within the district, it seems to me that I cannot construe the word 'residing' there as meaning or including persons 'carrying on business' in the district; and when, in the subsequent section, it is provided that no summons shall issue against persons out of the district, and not being or residing in the colony, I cannot hold that, for the purposes of the Act, the defendants (who are not a corporation or a company) are to be taken as residing in the colony because they carry on business there, in the face of the affidavit that no one of them is a resident within the colony within the meaning of the Act": *Latter v. Brogden* (2 N.Z.J.R.N.S. 134).

The applicant's permanent home was at Tamworth, but he had lived for a few weeks at Quirindi for the purpose of carrying out a contract there. He was sued at the Quirindi Small Debts Court for a tort committed there, but a prohibition was granted—he did not usually reside at Quirindi within the meaning of 10 Vic. No. 10, sec. 23; 1899 No. 13, s. 18: *Ex parte Bowen* (18 N.S.W.R. 126).

On the question whether a Small Debts Court had jurisdiction, the defendant contended that he did not usually reside within its jurisdiction. *Stephen, J.*: "Each case must depend upon its own facts, and the facts of *Ex parte Slate* were very different from this. Even so, I do not agree with *Innes, J.*, that a man can have two usual residences": *Ex parte Bowen* (18 N.S.W.R. 126).

On application for a prohibition on the ground of non-residence within the district, the applicant's affidavit stated that he usually

resided in George-street, Sydney. *Held*, that there was nothing to show that he did not reside within the Petty Sessions District of Hartley. The prohibition was refused : *Ex parte Galanis* (23 W.N. 19).

By sec. 12 Mayor's Court Extension Act 1867, "Where the debt or damage claimed in any action shall not exceed £50, no plea to the jurisdiction shall be allowed, provided the defendant . . . shall dwell or carry on business within the city of London." Defendant sought a prohibition on the ground that he did not dwell nor carry on business within the city ; he dwelt outside the city, but worked as a clerk for a solicitor in the city. It was held that this did not constitute "carrying on business" within the city, and a prohibition was granted : *Graham v. Lewis* (22 Q.B.D. 1). But cf. *Ex parte Breull* ; *In re Bowie* (16 C.D. 484).

B. was the owner of a station in the G. district, which he visited every year for two or three months. About a month after he had left the station and returned to his Sydney residence, certain trespasses were committed at G., for which he was sued in the G. District Court. It was *held* by *Hargrave* and *Faucett*, JJ. (*Martin*, C.J., *diss.*) that B. was "resident" at G. for the purposes of sec. 5 District Courts Act 1858. Where a person resides at two different districts, the test of whether he can be sued in either of those districts is "at which of them was he actually residing at the time of action brought." *Per Martin*, C.J. : "If a man has a house in Sydney and stations in the country, he resides for the purpose of local transactions at those stations."—*Per Hargrave*, J., *Faucett*, J. assenting : *Ex parte Broughton* (Knox 189).

The defendant was a contractor for building a bridge at A., where he slept for three or four months, but he ordinarily lived at S. He was sued in the District Court at A.—but a prohibition was granted : he was not resident at A. within the meaning of sec. 4 District Courts Act 1858 (now 1901 No. 4, s. 6) : *Ex parte Baillie* (5 S.C.R. 17).

The only evidence as to residence before the District Court Judge was that the applicant occasionally went to his station in the district of that District Court. *Held*, that it was quite clear that he did not reside within the district and a prohibition was granted : *Ex parte Atkinson* (3 S.R. 314).

Where a summons is served upon a defendant who resides in another colony, or even upon a New South Wales resident whilst he is in another colony, the Court has no jurisdiction to proceed under sec. 5 Master and Servant Act. Nor does the jurisdiction exist where the summons is duly backed by a J.P. of the other colony : *Ex parte Burton* (9 W.N. 114).

The Mayor's Court attached goods of a garnishee which were never within the jurisdiction. Prohibition was granted—it is an essential part of the jurisdiction of all inferior Courts that the goods be within the jurisdiction : *Mayor v. Carmot* (19 W.R. 756).

A company was formed in Queensland for the purpose of disposing by lottery of land in Melbourne belonging to a building society which was incorporated in Queensland. The lottery was to be drawn in Queensland. The defendants were agents of the company in Victoria, and received applications for shares in the lottery scheme. Upon an information being laid under sec. 37 Police Offences Act, a prohibition was sought, but refused—though the lottery was to be drawn in Queensland, it was an endeavour to dispose of lands in Melbourne by a lottery under sec. 37 of the Act : *Cawsey v. Andrews* (20 V.L.R. 332).

A summons to the Mining Warden's Court was returnable in a district in which the applicant did not reside. This was contrary to rule 1 of Mining Warden's Rules 1874, but by sec. 68 Mining Act 1874 every mining warden has jurisdiction throughout the whole colony. A prohibition was refused—the warden had jurisdiction, and a prohibition is not granted for infraction of a rule of practice : *Ex parte Moor* (7 W.N. 136).

An order for substituted service being made against a person not resident within the local limits of the Court of Exchequer of Chester, a prohibition was granted : they cannot serve process of their Exchequer upon a man out of the jurisdiction ; they cannot make a supplemental order to supply this defect of jurisdiction ; they cannot proceed where part (*i.e.*, one of the parties) is out of their jurisdiction : *Rowland v. Hockenulle* (1 Ld. Ray. 698).

A Judge of the Court of Mines, who has heard an appeal from a warden within a certain mining district, has power to make an order on such appeal when sitting outside such district : *Coates v. South Loch Fyne G. M. Co.* (26 V.L.R. 117 ; 22 A.L.T. 2 ; 6 A.L.R. 125). Cf. *Hudson v. Tooth* (3 Q.B.D. 46).

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#### iv. Persons.

Prohibition lies where an inferior Court purports to impose a liability upon a person not amenable to its jurisdiction.

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Prohibition is the proper remedy where an inferior Court entertains a suit against a foreign sovereign in his



representative capacity : *Wadsworth v. Queen of Spain* ;  
*De Haber v. Queen of Portugal* (17 Q.B. 171).

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No Court has jurisdiction over a foreign sovereign for acts or omissions in his public and representative capacity :  
*Duke of Brunswick v. King of Hanover* (2 H.L.C. 1).

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*Illustrations.*

Prohibition granted to restrain proceedings on an order made under the Deserted Wives and Children Act 1901, sec. 8 (2), attaching moneys in the hands of the Government paymaster. *Conolly v. Lyne* (8 N.S.W. L.R. 231) followed : *Ex parte Pownall* (24 W.N. 135).

The Treasurer of Queensland applied for a prohibition to restrain the justices of Brisbane and one Bone from proceeding on an order attaching moneys in the hands of the applicant to answer a debt due by one Glass to Bone. The ground alleged was that the justices had no jurisdiction over the Treasurer, enabling them to make the order against him, inasmuch as he was not resident in the district in which he was sued : a prohibition was granted—the Crown is not bound by garnishee proceedings, and the Treasurer was not liable under the Savings Bank Act, or any other law, to be sued for such debt : *R. v. Justices of Brisbane* ; *Ex parte The Treasurer of Queensland* (11 Q.L.J. 77).

An action was brought in a Magistrate's Court for goods sold and delivered against a married woman, and judgment given against her. Thereafter, the judgment creditor took out a judgment summons against the woman and issued a writ of arrest ; the judgment was incorporated in the statement of claim before the magistrate. "It therefore appeared on the face of the proceedings that the claim was one in respect of which no action could be brought against the defendant, she being a married woman and no action lying on a judgment against her—she is under no personal liability, but the judgment is against her separate estate." The issue of a writ of arrest in such circumstances was *held* an excess of jurisdiction, and a prohibition was granted by *Williams, J.* : *Prosser v. Miller* (12 N.Z.L.R. 646).

A prohibition was sought to a Court Martial on the ground (*inter alia*) that the applicant was not a soldier, and therefore not liable to be tried by martial law. *Lord Loughborough* said that this was a material

ground, because, if it were made out "that the Court had no jurisdiction over the person, then of course they were proceeding in a case in which by law they ought not to have been proceeding." The applicant was in fact *held* to be a soldier, as he had received pay as such : *Grant v. Gould* (2 H. Bl. at 102).

A County Court Judge has power to order the bailiff of his own Court to pay damages for a negligent execution, but he has no power to order the bailiff of a foreign County Court to do so. Where he ordered the bailiff of a foreign County Court to pay such damages, the bailiff obtained a prohibition : *R. v. Judge of County Court of Shropshire* (20 Q.B.D. 242).

A magistrate being sued in a District Court for something done by him as a justice, served on the plaintiff a notice under sec. 10 of 11 & 12 Vict. c. 44 (1902 No. 27, sec. 140) that he objected to being sued in the District Court. *Held*, that after the notice the District Court had no jurisdiction, and a prohibition was granted : *Ex parte Bolding* (3 S.C.R. 370).

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### C.—HOW FAR THE SUPERIOR COURT IS CONCLUDED BY THE DECISION OF THE INFERIOR COURT THAT IT HAS JURISDICTION.

The decision of an inferior Court that it has jurisdiction is conclusive upon the Superior Court, so far as that decision is founded upon fact (unless the facts are perversely or manifestly erroneously decided), but is not binding upon the superior Court so far as that decision is founded upon law.

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"An inferior tribunal cannot give itself jurisdiction by deciding without evidence ; on the other hand, it cannot refuse to go into evidence in order to ascertain whether it has or has not jurisdiction ; and if it takes upon itself jurisdiction without evidence, or after refusing to go into evidence, and it turns out that there was no jurisdiction, this Court will interfere by prohibition. But when the Judge has gone into the inquiry and has determined the question of fact, this Court cannot look to see whether the decision was, on the balance of evidence, right or not.

We cannot review the decision of an inferior tribunal as though it were a verdict of a jury in an action in our own Court. We have no jurisdiction of that kind. When the Judge has gone into the evidence, we are precluded from going into the matter, and are bound by his decision.”—*Cockburn, C.J., in Brown v. Cocking* (L.R. 3 Q.B. 672).

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“ If it (the defect of jurisdiction) be not apparent, but the party instead of moving for a prohibition pleads in the special, or inferior, Court the facts ousting the jurisdiction, and such Court improperly decides that it has jurisdiction, he may, notwithstanding such decision, on satisfying the superior Court that it was erroneous, obtain a prohibition : *Thompson v. Ingham* (14 Q.B. 710) followed in *Chew v. Holroyd* (8 Ex. 249) and *Marsden v. Wardle* (3 E. & B. 695).” —*Willes, J., in Mayor, &c. of London v. Cox* (L.R. 2 E. & I. at 282).

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“ The rule in cases of this kind was laid down by the Exchequer Chamber in *Bunbury v. Fuller* (9 Ex. 111), cited by Mr. Justice *Blackburn* in *Pease v. Chaytor* (3 B. & S. 620), and adopted by the Privy Council in *The Colonial Bank of Australasia v. Willan* (L.R. 5 P.C. 417 at 444), and is as follows :—‘ It is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends ; and however its decision may be final on all particulars making up together that subject matter which, if true, is within its jurisdiction, and however necessary it may be in many cases to make such a preliminary inquiry, yet upon this preliminary question its decision must always be open to inquiry in the superior Court.’ The judgment in *Bunbury v. Fuller* (*ubi sup.*) illustrates this proposition by supposing the case

of a Judge with a jurisdiction limited to a particular hundred and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred. The judgment goes on to say : ‘ This is clearly a collateral matter, independent of the merits. On its being presented, the Judge must not immediately forbear to proceed, but must inquire into its truth or falsehood and for the time decide it, and either proceed or not with the principal subject matter according as he finds on that point ; but this decision must be open to question and if he has improperly either forborne or proceeded on the main matter, in consequence of an error in this, the Court of Queen’s Bench will issue its mandamus or prohibition to correct his mistake.’ No doubt, as was said by *Cockburn*, C.J., in *Elston v. Rose* (L.R. 4 Q.B. 4), if there has been a real conflict of testimony upon some fact which goes to the question of jurisdiction and the Judge decides, the Court above will not interfere except upon very strong grounds ; but when the Judge has given himself jurisdiction by coming to an erroneous decision upon a point of law upon facts which are admitted or are not in dispute, the case is different, and the Judge is in fact without jurisdiction and will be prohibited. In the present case, there is no dispute as to the facts, so that if the legal conclusion from the facts is that the subject matter of the action is not within the jurisdiction conferred upon the warden by sec. 254 (The Mining Act 1898) the plaintiff is entitled to a prohibition unless he has lost that right by waiver or acquiescence.”—*Williams*, J., in *Wells v. Carew* (19 N.Z.L.R. 349).

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“ If the decision of the justices on a question on which their jurisdiction depends is manifestly wrong, the Court will not pay any attention to their finding. If it manifestly proceeds upon a wrong notion of the law, the Court

would not pay any attention to their finding. But if the facts upon which their jurisdiction depends were investigated by them and their finding was not manifestly wrong, the Court will hesitate very much before it will interfere. That does not import that the Court abrogates its right to inquire into the jurisdiction of inferior Courts, but that it will decline to interfere when it is very doubtful whether the facts are different from what the inferior Courts have found."—*Griffith*, C.J., in *R. v. Yaldwyn JJ.* (9 Q.L.J. at 244).

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"The general rule appears to be that if the existence or non-existence of jurisdiction depends on contested facts which the inferior Court is competent to inquire into and determine, prohibition will not be granted, though the superior Court should be of opinion that the questions of fact have been wrongly determined by the Court below and such facts, if rightly determined would have ousted the jurisdiction. The contrary, of course, is the case if the magistrate has given himself jurisdiction by an erroneous interpretation of the law. See *Joseph v. Henry* (19 L.J.Q.B. 369); *In re Brown v. Cocking* (L.R. 3 Q.B. 672); *In re Elston v. Rose* (L.R. 4 Q.B. 4)."—*Edwards*, J., in *Wilkins v. Robinson* (10 N.Z.L.R. 397).

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"If the existence or non-existence of jurisdiction depends on contested facts which the inferior Court is competent to inquire into and determine, a prohibition will not be granted; though the superior Court should be of opinion that the questions of fact have been wrongly determined by the Court below, and if rightly determined would have ousted the jurisdiction; unless the High Court is of opinion that the Judge below has perversely so decided and has not honestly and fairly exercised his judgment



upon the evidence before him ; or unless he proceeds upon a wrong principle of law in arriving at his determination of the facts.”—Full Court in *Holburd v. The Burwood Extended Coal Co.* (11 N.S.W.R. 365—adopting Shortt, p. 450).

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“ The magistrate could not give himself jurisdiction by admitting evidence which was inadmissible.”—*Stephen, J.*, in *Ex parte Gazzard* (15 N.S.W.R. 394). But see *Shop Assistants’ Union v. Mark Foy* (1906 A.R. 388).

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“ *Thompson v. Ingham* (1 L.M. & P. 216) only decides that where upon the record, stating the facts, it is admitted that the Judge has decided wrongly on the fact on which his jurisdiction depends, so that the Court sees undoubtedly that he had not jurisdiction, prohibition will lie. But in this case we have conflicting affidavits ; it is possible that, in spite of the defendant’s evidence, the Judge’s decision may have been right upon the fact ; and if I were to make this rule absolute, I should establish a precedent for reviewing the decision of the Judge in every case where his jurisdiction depended upon conflicting evidence ; which would be full of inconvenience and contrary to all principle. I think, therefore, this rule should be discharged.”—*Coleridge, J.*, in *Joseph v. Henry* (1 L.M. & P. 388).

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“ The question is whether . . . the parties ordered to be joined by the Court were properly joined. It is to my mind clear that where a question of jurisdiction depends upon disputed facts which it is within the competency of the inferior Court to decide, prohibition will not be granted, although this Court may disagree with the conclusions of fact to which the inferior tribunal has come, and although even in that decision the jurisdiction may be based upon

an erroneous conclusion."—*Burnside, J. : Coastal Boiler-maker's, &c., Union v. Millar's Karri & Jarrah Co.* (7 W.A.L.R. 288).

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"Although Mr. *Forster* has argued that if the magistrate wrongly determined a question of fact so as to give himself jurisdiction, that is a ground for prohibition, still I find that there are several cases which have laid it down that if the superior Court be of opinion that questions of fact have been wrongly determined in the Court below which, if rightly determined, would have ousted the jurisdiction, unless the Court is of opinion that the Judge below perversely decided the facts it will not grant the prohibition": *Moderana v. Backhouse* (7 W.A.L.R. 39).

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"Was then their decision conclusive? The general rule is thus stated by *Coleridge, J.*, in delivering the judgment of the Exchequer Chamber in *Bunbury v. Fuller* (9 Exch. 140): 'No Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limits to its jurisdiction depend; and however its decision may be final on all particulars making up together that subject matter which, if true, is within its jurisdiction; and however necessary in many cases it may be for it to make a preliminary inquiry whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior Court.' . . . I pass over, as not germane to the question upon which I base my judgment, whether the error which entitles the party to the writ is confined to an erroneous assumption of law, or also extends to wrong determinations of fact as to which there is conflicting testimony. On the other hand, where the matter upon which the wrong determination is alleged to have been made is part of the merits,

it has never been doubted since the leading case of *R. v. Bolton* (1 Q.B. 66) that the decision is not examinable.”—*Palles*, C.B., in *In re Irish Land Commission* (14 L.R. (Ir.) 89, 90).

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*Illustrations.*

The Industrial Arbitration Court had jurisdiction to make awards in case of disputes between employer and employee in any industry, and to make the terms of such award a common rule in such industry and to inflict a penalty for breaches. An award was made in an industry which award was made a common rule, and on a supposed breach thereof proceedings were taken in the Industrial Arbitration Court for a penalty. The defendants contended that the persons in respect to whom the breaches were allegedly committed, were not employees but independent contractors, but the Court found against this contention and inflicted a penalty. The Supreme Court of New South Wales granted a prohibition on the ground that there was no jurisdiction, inasmuch as the relationship of employer and employee did not exist. On appeal to the High Court, *held* that the question whether the relation of employer and employee existed was not a question preliminary or collateral, which had to be determined in order to ascertain whether or not jurisdiction existed, but a question which went to the merits, and that even if the decision of the Arbitration Court was wrong, it was a mere error of law, and therefore not a ground for prohibition. *Griffith*, C.J., pointed out the distinction between the former cases in which prohibition had been granted to the Arbitration Court, and the case in question, saying “In considering the extent of a punitive jurisdiction of this sort, very different considerations apply from those applicable to the consideration of the arbitral jurisdiction of the Court.” (*O'Connor*, J., said: “It was urged . . . that the question whether the relation of employer and employee existed was a matter extrinsic to the adjudication impeached, and stood upon the same footing as those questions which may be raised in the County Courts regarding the residence of a defendant, or the existence of a *bona fide* dispute as to title to land. In such cases, no doubt, a County Court could not by a wrong decision give itself jurisdiction. On such matters, which are extrinsic to the adjudication impeached, the decision of the inferior Court is always open to inquiry. In support of that contention the respondent’s counsel argued that the jurisdiction of the Arbitration Court was restricted by the Act to one class of persons—those persons

between whom the relation of employer and employee existed—and that it was necessary to establish as a collateral, extrinsic, or preliminary fact that the disputants came within that class before the Court could have jurisdiction over them. I can see in the Act no foundation for that contention. The jurisdiction of the Court is general over every person in New South Wales, as to whom is established before the Court that state of facts which the statute has authorised it to deal with . . . The Court has jurisdiction in disputes as to industrial matters within the meaning of the Act where the relation of employer and employee is involved—in the hearing of the dispute which it is empowered to settle it must necessarily determine whether that relation does or does not exist, and it is empowered to decide every question of fact or law necessary for that determination. Its determination of that question may be right or may be erroneous. If its error is shown on the face of the proceedings, as in *Clancy's case* (1 C.L.R. 181), the superior Court will have power to grant a prohibition. But if the error is not shown on the face of its proceedings, there is no way by which the correctness of the determination can on a motion for prohibition be questioned. In the proceedings before the Court the original award was made binding only on employers and employees. The common rule similarly in its terms extended only to employers and employees—the summons by reference embodied the award. The matter for determination by the Court was first whether there existed between the respondent company and the carpenters the relation of employer and employee necessary to bring them within the terms of the common rule; second, whether there had been a breach of that award. It was clearly within the jurisdiction of the Court to enter upon that enquiry and having determined that the relation of employer and employee did exist, the order inflicting penalties was founded on that determination. It discloses no want of jurisdiction on the face of it. Under the circumstances the decision of the Court whether right or wrong in fact or in law, is conclusive and beyond reach of enquiry by the Supreme Court or any other Court." *Isaacs, J.*, said: "The rule (*i.e.*, the rule in *Bunbury v. Fuller*, 9 Ex. 111, at p. 140) is beyond question, but everything depends upon ascertaining in any particular case whether the matter in contention is collateral or preliminary, or is part of the subject matter, which if true, is within the Court's jurisdiction . . . The determination of the fact is absolutely essential to the ascertainment of whether a breach of the common rule has or has not been committed by the individual charged; and unless the Court finds that he is an employer, and the person alleged to have been underpaid is his employee within the meaning of the Act, there could be no breach of a common rule to pay the minimum

wage. The question of whether the defendants fall within the specified class is not an element which is merely essential to jurisdiction, but is essential to an adverse adjudication ; because it is an ingredient in the breach alleged. It is not, therefore, a preliminary matter, nor a collateral point within the rule of *Bunbury v. Fuller*, but is part of the subject matter, and necessarily comes within the purview of the Court, which cannot possibly arrive at a decision against the defendants without determining the point" : *Amalgamated Society of Carpenters, &c. v. Haberfield Proprietary, Ltd.* (5 C.L.R. 33). And see *R. v. Police Magistrate at Gympie* (1909 S.R. (Q.) 19 ; Q.W.N. 2).

A prohibition being sought to an Admiralty Court, *Lord Loughborough* said : " On this declaration are alleged two different gravamina ; the first, that the Court of Appeals has misconstrued the Act of Parliament by which its jurisdiction is regulated ; the second, that it is using process which it has no authority to enforce. Either of these points, clearly made out, would be a good ground of prohibition ; the first, on an ancient and essential maxim of the common law that all Courts of special jurisdiction created by Act of Parliament must be limited in the exercise of that jurisdiction by such construction as the Courts of common law may give to the statutes, because, if they had a latitude to construe at their discretion the law by which they act, they would set themselves above the common law . . . ." : *Brymer v. Atkins* (1 H. Bl. at 187).

The plaint in a Small Debts Court was :—" To 141 weeks wages at £1 per week, £141 ; to cash drawn, £131 8s. ; to balance due, £9 12s." A prohibition was sought on the ground that the Small Debts Court had no jurisdiction, as the amount of the plaintiff's demand exceeded £30, and involved the investigation of a claim which exceeded that amount. Had the balance been admitted the Court would have had jurisdiction. The plaintiff's affidavit stated that he gave evidence that the defendant had " virtually admitted " the balance, and the magistrate's affidavit stated that the claim of the plaintiff was " practically admitted," and the magistrate gave as a reason for the statement that in a letter which the defendant wrote to the bench asking for an adjournment, he stated that he had paid the plaintiff in full. *Darley, C.J.* : " I believe the verdict, so far as it is based on the fact of an admitted balance, to be absolutely wrong. . . . This is not a Court of Appeal from the magistrate, and as he found a balance admitted, the verdict, no matter how erroneous and unjust it may happen to be must stand." *Cohen, J.* : " According to *Ex parte Gazzard* (15 N.S.W.R. 394 ; 11 W.N. 21), and *Evans v. Wedderburn* (15 N.S.W.R. 482 ; 11 W.N. 82), the judgment of this Court must depend on whether or no there was evi-



dence before the magistrate that the defendant had admitted the sum sued for as the amount due by him to the plaintiff, because, if there was such evidence, a prohibition will not lie": *Ex parte Bourke* (19 N.S.W.R. 370; 15 W.N. 109). And see *R. v. Morgan*; *Ex parte Dehnert* (2 V.L.R.C.L. 102).

A summons in the Small Debts Court was not served within the time prescribed by the rules. On motion for prohibition it was argued that applicant had waived the objection. "If evidence for and against on the question of waiver had been given before the magistrate, and he had decided there had been such waiver, I do not think we could have granted the prohibition": *Ex parte Mimna* (16 W.N. 209).

By the County Courts Act, 30 & 31 Vic. c. 142, sec. 11, County Courts have jurisdiction in ejectment "where neither the value of the lands &c., nor the rent payable in respect thereof" exceeds £20 per annum. It was *held* that the test of jurisdiction is the value or rent as between the litigant parties, and not the value or rent as between the lessee and a sub-lessee. But a prohibition was sought on the ground that the rent exceeded £20. *Cockburn, C.J.*: "Whether the Judge was right or not, he determined the matter as a question of fact. It was incumbent on him to go into evidence on the subject, irrespective of the merits, in order to see whether he had jurisdiction, and we cannot review his decision. We control the County Court so as to keep it within the legitimate sphere of its jurisdiction, and if it decides without evidence that a case is within its jurisdiction . . . this Court will interfere. But when the Judge has properly investigated that which is the foundation of his jurisdiction, this Court will not inquire whether his conclusion on the balance of evidence was right or wrong. We do not review his decision on a question of fact, as we should the verdict of a jury in a cause in this Court." *Lush, J.*: ". . . Then, there being evidence to justify his decision, it is conclusive." *Hannen, J.*: ". . . I have some hesitation in concurring in the judgment that we are absolutely concluded by the decision of the Judge on conflicting evidence; but in a case like the present, where the evidence is so nicely balanced, we ought not to interfere": *In re Brown v. Cocking* (L.R. 3 Q.B. 672). Cf. *Johnson v. Haselden* (12 N.Z. Gaz. L.R. 105).

By the County Courts Act, 30 & 31 Vic. c. 142, sec. 11, the County Court's jurisdiction in ejectment is limited to cases in which "neither the value of the lands nor the rent payable in respect thereof" exceeds £20 per annum. The occupier was sued by the assignee of a term subject to a ground rent, and the County Court Judge held that by deducting the ground rent, the annual value was reduced below £20, and he therefore had jurisdiction. It was *held* that the "value" under sec. 11 is

the marketable value, of which the rent paid by the tenant to the immediate landlord is, in the absence of special circumstances, a fair criterion: that as the Judge had adopted an erroneous test of value, a prohibition should go. *Cockburn*, C.J.: "Where there is a conflict of evidence as to fact on which the jurisdiction of the County Court Judge depends, although if we see that he has perversely decided, his decision is not conclusive, yet, if there is reasonable ground for upholding his decision, this Court will not interfere by prohibition where he has honestly and fairly exercised his judgment upon the evidence before him. But where there is no conflict of evidence, and, by reason of an erroneous decision in point of law, he has exercised an authority or jurisdiction which does not by law exist, then prohibition should issue." *Blackburn*, J.: "In the present case, the question of fact being whether the value exceeded £20, I think the case is one for prohibition: and this is consistent with *In re Brown v. Cocking* (9 B. & S. 503), where this Court refused to interfere with the decision of the County Court Judge upon conflicting evidence. Though his decision in such a case is not conclusive, yet, for practical purposes, a strong and peculiar case must be made out to justify us in reversing it and coming to the conclusion that he was wrong. To that extent I agree with *In re Brown v. Cocking*. In the present case the Judge did not decide the value except in this way, that if he deducted the ground rent the value would be below £20, but if the ground rent was not deducted the value would exceed £20. And we may hold, in accordance with *Thompson v. Ingham* (14 Q.B. 710), that he was wrong in the conclusion to which he came, because he applied a wrong test to determine the value": *In re Elstone v. Rose* (L.R. 4 Q.B. 4). Cf. *Doyle v. Anyon* (3 Q.J.P.R. 183).

8 & 9 Vic. c. 118 empowered Commissioners to enclose certain lands upon the consent of certain persons therein defined being given. Where the Commissioners acted on a wrong principle in deciding whether the necessary consents had been given, a prohibition was granted: *Church v. Inclosure Commissioners* (11 C.B.N.S. 664).

An Act provided that appellees from a decision should be entitled to execute the sentence appealed from upon giving security for the "full value" of the subject matter. A prohibition was sought on the ground that the other party was seeking to enforce a security of greater amount than the Act allowed. *Lord Loughborough*, after stating that the inferior Court were not in fact tied down to any definite measure of value, said: "But even if we thought that the Court of Appeals had given an erroneous judgment as to the value, if we, sitting in a Court of Prize, should have determined differently, or could such a question have

come before a Court of common law, and it should have been proper to direct the jury to find the value *at the place of sale*, still there is no ground for a prohibition. I would not be understood to say that the Court of Appeals have in fact made an improper estimate of the value ; but be that estimate right or wrong, it is our province to say whether they have misconstrued the law ; misconception of law being a ground of prohibition. But as we are all of opinion that the act in dispute gives them authority to decide upon the measure of value, we have no right to prohibit them from enforcing their sentence, and therefore must direct a consultation to issue ” : *Brymer v. Atkins* (1 H. Bl. 193).

Justices ordered applicant to give up possession of land on a summons under the Tenements Recovery Act. A prohibition was applied for on the ground of no evidence of any tenancy. Had there been no evidence at all of a tenancy, the prohibition would have gone on the ground that the subject matter was not justiciable before the justices, but it was *held* that there was some evidence of tenancy and the Court could not on prohibition examine into the correctness of the decision in favour of a tenancy, and so no prohibition was granted : *Ex parte Gruer* (8 W.N. 44). And see *Ex parte Roberts* (Legge 775) ; *Ex parte Mullens* (14 S.C.R. 183) ; *Town v. Stevens* (17 N.Z.L.R. 828).

“ Even if this objection had been taken, the case of *Holburd v. The Burwood Extended Coal Co.* (11 N.S.W.R. 365 ; 7 W.N. 70), shows that the question whether the defendant resides within the jurisdiction is a question which the inferior Court has to decide. It is too late to raise this objection after that Court has given its decision ” : *Ex parte Rowland* (12 W.N. 79).

“ If the defendant, on being served with a summons issuing from a Court within the jurisdiction of which he does not reside, merely enters a protest, as by sending an affidavit of non-residence to the Registrar, prohibition lies if the District Court Judge decides that he is within the jurisdiction, but if he enters into evidence and is beaten on the facts, he is concluded by the decision of the Court below ” : *Ex parte Baillie* (5 S.C.R. 17).

Applicant was summoned to a Small Debts Court ; he objected that he was not usually resident within the district of the Court, in which he was sued, but there was evidence that he did so reside. “ After that objection the defendant contested the action, gave evidence for the defence, and endeavoured to get a decision in his favour. After so doing, I am inclined to think that it is too late to upset the decision on that ground, as there was evidence that he resided within the district ; and as the justices have decided the point it should not be disturbed.”—*Per Faucett, J.* : *Ex parte Osborne* (14 S.C.R. 344).

Where a party is sued in an inferior Court within the jurisdiction of which he alleges he does not reside, he may either apply at once for a prohibition, or submit the question to the decision of the inferior Court. In the latter case, the inferior Court has jurisdiction to deal with the objection. "If the Court above saw that in such a case there had been a right decision in the Court below on the evidence before it, that decision could not be disturbed. If, however, the superior Court should be of opinion that the decision on such evidence was wrong, it would be set right. In other words, the decision of the Court above must in such case rest upon the same evidence as that of the Court below. Their Honours could not see that the District Court was wrong upon the evidence before it, in holding that the applicant's residence in the district was made out, and although the evidence now adduced would probably lead to a different conclusion, the decision of the Court below must be confirmed": *Ex parte Nicholson* (Legge 1400; 1 S.C.R. 171n.).

A prosecution was instituted against the applicant under the Liquor Act, 1898 No. 18; sec. 107 requires that offences under that Act must be prosecuted at the Court of Petty Sessions nearest to the place where the offence was committed. The magistrates convicted the applicant, though it was in fact proved that the Court was not the nearest to the place where the offence was committed. A prohibition was granted: *Ex parte Davoren* (6 S.R. 270).

An action was brought for £4 in the County Court, for use and occupation, and the defendant, objecting that title to land was in dispute, declared in prohibition; the defendant in prohibition pleaded that the Judge heard evidence and argument and decided that title to land was not in issue. "If the plea, being in confession and avoidance, is to be taken to admit the statement in the declaration that in fact the title was in question, it is clearly bad; for then the Judge had no jurisdiction under 9 & 10 Vic. c. 95, sec. 58, and his thinking and deciding that he had would not give it to him. But, assuming that the plea does not admit that statement, but rather denies that it can be permitted to be made by reason of the decision of a competent Court that the title was not in question, the point will be whether that decision was conclusive. The law on this subject, as far as regards the analogous case of magistrates' convictions, was fully discussed in *R. v. Bolton* (1 Q.B. 66; 4 P. & D. 679), and it was there held that where the charge is such as, if true, is within the magistrate's jurisdiction, the finding of the facts afterwards by the magistrate is conclusive; but that where the charge is not such as, if true, would be within the magistrates' jurisdiction, no finding of facts can alter it. The present case is between those so put. The Judge has clearly jurisdiction, *prima*



*facie*, to try a plaint for use and occupation. The pleadings, if there were any in the County Court, would not show that the title is in question. The point whether it is or not must, of necessity, arise upon the evidence: and as soon as it appears that it is, the jurisdiction of the Court ceases. The Judge must of necessity determine that point for the time, because on it depends whether he hears the case upon the merits. Is then his determination conclusive? We think that it is not. The objection is analogous to a plea to the jurisdiction in other Courts, which is, indeed, determined in the first instance by the Court in which it is pleaded, but is subject to a writ of error. The County Court gives no writ of error or appeal of any sort; but then it is presumed that a Court deals only with matters within its jurisdiction. If a doubt arises as to that question, we think it impossible to contend that any of the provisions of the Act make the solution of that doubt by the Court itself final. If so, the question must be open to one of the superior Courts, on motion for a prohibition, by affidavit; and if that Court, as in the present case, directs that the party should declare, then the question becomes one of evidence. In either view of the plea, therefore, we are of opinion that judgment must be for the plaintiff": *Thompson v. Ingham* (1 L.M. & P. 216). And see *Chew v. Holroyd* (8 Ex. 249).

"Where there are special pleadings and the question can be raised upon them, the Judge can go no further. But where the question is not raised upon the pleadings, but is merely suggested by the defendant, the Judge must inquire into the circumstances before he can be satisfied that title does come in question. If he is wrong and assumes jurisdiction when the title really is in question, the defendant, upon making that appear to the superior Court, would be entitled to a prohibition. The cases that have been decided on the 53 Geo. III. c. 127, sec. 7, are authorities for this view of the case. The terms of the provisions of the two statutes are not the same, but the point in question is common to both. In *R. v. Chapel Wardens of Milnrow* (5 M. & S. 248) and *R. v. Wrottesley* (1 B. & Ad. 648; 9 L.J.M.C. 51), it was considered that the justices in a case under the 53 Geo. III. must be satisfied that there is a *bona fide* intention to dispute the rate before they are bound to stop. If, notwithstanding reasonable evidence that the title is really in question, the Judge of the inferior Court still goes on "his assumption of jurisdiction may be superseded by a prohibition": *Lilley v. Harvey* (17 L.J.Q.B. 357).

The applicant was convicted before justices under sec. 511 Local Government Act, 1874 No. 506, for obstructing a person employed by a municipality to remove obstructions that prevented free access to a



public bridge. A prohibition was sought on the ground that a question of title to land was *bona fide* raised, but *Fellows*, J. (in Banco) said : “ . . . . An attempt was made to raise the question whether the *locus in quo* was a highway, but we think the justices’ decision on that point is conclusive : *Reg. v. Dayman* (7 E. & B. 672). If the person convicted considers that the justices have come to a wrong decision on that point, he can try the question by means of an action of trespass against any person who uses the alleged highway, as the justices’ decision is not binding except for the purpose of enforcing this particular conviction” : *Ex parte Scott* ; *Re Strutt & others* (2 V.L.R.C.L. 70). [Cf. No. 1893, sec. 712.]

Plaintiff and defendant had adjoining blocks of land, the common boundary of which was described in their grants as a certain stream. Plaintiff sued in the District Court for trespass to the portion of the land between the ordinary channel and the flood channel. The Judge entertained the action, holding that title to land was not *bona fide* in dispute. A prohibition was granted by *Richmond*, J., who said : “ On the third point, that the decision of the District Court Judge is *not* conclusive on the question of jurisdiction, the case of *Thompson v. Ingham* (14 Q.B. 710) is a ruling authority. The fallacy of Mr. *Gully’s* argument—(*i.e.*, that the District Court Judge having decided a question of jurisdiction entirely on contested facts, his decision on the facts is conclusive and cannot be inquired into by this Court : *Joseph v. Henry* (1 L.M. & P. 388) ; *Brown v. Cocking* (L.R. 3 Q.B. 672)—is apparent when the inquiry is made, on what question in this case does the jurisdiction depend ? Now it depends on the question whether or not the title to real property is in dispute. In the cases of *Joseph v. Henry* (1 L.M. & P. 388 ; 19 L.J.Q.B. 369) and *Brown v. Cocking* (L.R. 3 Q.B. 672), the jurisdiction depended upon disputable questions of fact on which there was conflicting evidence, and the Court would not interfere with the decisions of the inferior Judges. But here the question is not a disputable one, but whether the title to the land is in question, and that is not a disputable fact, but a conclusion of law on indisputable facts, and must be decided in the affirmative. Mr. *Gully* put it that the question was whether there had been a deviation in the course of the stream, but that is not the question upon which the *jurisdiction* depended, or was supposed to depend, but the question on which the *title* depended. In short, the question as to whether a trespass had or had not been committed resolved itself into a question as to whether the land belonged to the plaintiff or the defendant, which was plainly beyond the competency of the District Court” : *Hunt v. Harcastle* (N.Z.L.R. 3 S.C. 21).

It was *held*, on application for prohibition, that where a question of title, or of a *bona fide* belief by a defendant in his right to do an act complained of is set up, it is for the justices to decide, as a matter of fact, whether such a defence is *bona fide* raised: even if they find contrary to the evidence the Court will not prohibit their proceedings if there is any evidence to go to them upon the point. An appeal is the appropriate remedy in such a case: *R. v. Walker*; *Ex parte Kennedy* (4 V.L.R.C.L. 452).

An action was brought in the District Court for trespass by sheep of defendant to land of plaintiff. Plaintiff took up a conditional purchase on defendant's run. Defendant set up that the land was his, as he had improved it to the extent of £40, and the land was not open for selection. Five witnesses of plaintiff swore that the improvements were only about £7 or £8, and that the alleged improvements were outside the land selected. A verdict went for plaintiff, and a prohibition was granted. *Martin*, C.J.: "If the defence of defendant was set up *bona fide*, it was a good one, and it appeared to the Court that the defence was *bona fide*." *Faucett*, J., said: "I am following previous rulings of this Court. The Court below, if it be suggested that the defence is a sham, may decide that it is a mere sham; but it does so at the risk of a motion such as this. On the whole, I am disposed to think that the claim must be taken to be a *bona fide* one": *Ex parte Forlonge* (2 S.C.R.N.S. 28).

A. directed the insertion of an advertisement in a paper for six months; at the end of one month, he directed discontinuance and promised to draw up a fresh form of advertisement. He did not do so and was sued for the price of the one month's advertisement. On verdict against him he moved for a prohibition, on the ground that it was not a case of work and labour, but of a special contract for six months. The prohibition was refused—the justices were at liberty to decide on the evidence that the special contract was rescinded by mutual agreement, and if that were so, the complainants could sue for the work done: *R. v. Call*; *Ex parte Thompson* (2 A.J.R. 106).

A poor rate was made for a township, and a dissatisfied person applied to the union assessment committee for relief, which was declined on 3rd August. An appeal could then have been lodged for the Quarter Sessions of 1st September following, but the appeal was not in fact lodged till 26th October, when the parish officers objected that the application was too late. The Recorder held that the September Sessions were not "the next practicable Quarter Sessions" within the meaning of the Act, as 21 days' notice of appeal had to be given and that left the appellant only seven days in which to make up his mind

on the question of whether he would appeal, and that this was not a reasonable time for that purpose. A prohibition was granted: the decision of the Recorder upon the facts was wrong. *Brett, J.*, said: "As I understand the case of *Elston v. Rose* (L.R. 4 Q.B. 4), it seems to have been assumed by the *Lord Chief Justice*, and it is declared expressly by my brother *Blackburn*, that if the Recorder was wrong in so deciding, this Court may review his decision upon a motion for a prohibition. Taking into consideration all the circumstances of the present case, I think it is impossible to say that the parties could reasonably require six or seven days to make up their minds as to the propriety of appealing. I therefore think the Recorder was wrong in point of fact, and that this rule should be made absolute": *Liverpool Gas Co. v. Everton* (L.R. 6 C.P. 414).

A County Court rule required the claimant in an interpleader to deliver particulars in which his address "shall be fully set forth." The claimant gave his address as *Elizabeth Street*, Islington, whereas it was in fact *Elizabeth Terrace*, Islington, and the County Court Judge dismissed the claim on the ground that the rule had not been complied with. A prohibition was granted in the original plaint, as the Judge had no jurisdiction to allow execution to proceed while the interpleader was pending. On motion to set aside the prohibition on the ground that the Judge was the proper person to decide whether the rule had been complied with, the application was refused. "... I am of opinion that his decision is not conclusive. If, indeed, the rule had in terms or by necessary implication authorised him to determine that question, his decision would have been final, however erroneous; but the rule contains no provision of that kind. Then, if in this case the condition was complied with, *ex necessitate*, the power of the Judge to proceed with the original suit was at an end. That is a question which we are now to determine, for it is clear from the case of *Thompson v. Ingham* (14 Q.B. 710) that the question cannot be conclusively determined by the County Court Judge." As the address was in fact sufficient, it was *held* that the prohibition was rightly issued: *Ex parte McFee* (9 Ex. 261).

Sec. 72 Bankruptcy Act 1869 (32 & 33 Vic. c. 71) enacts that "every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions, whether of law or fact, arising in any case of bankruptcy coming within the cognisance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete distribution of property in any such case." A County Court Judge, acting under the section, "deemed it expedient" to restrain a trader in London from

enforcing a claim in a Vice-Admiralty Court abroad, in respect of a lien on a ship which formed part of the bankrupt estate, and to direct an issue to try the matter in his Court. A prohibition was sought to restrain the continuance of the injunction, on the ground that it was not within the County Court's jurisdiction to make such an order, but was refused—the Judge had jurisdiction to make the order, and if it was improperly made, the remedy was by appeal and not prohibition. *Brett, J.*, said: "The County Court Judge certainly had jurisdiction to determine as a matter of fact 'whether he deemed it necessary to enter into this inquiry' and having so deemed it, he has given himself jurisdiction to enter upon the inquiry": *Halliday v. Harris* (L.R. 9 C.P. 668).

A prohibition will be granted if a case is heard against a defendant who was not served with process and did not appear; but if the Court had evidence under sec. 64 of the District Court Act of service of the summons, and had rightly or wrongly decided that there had been service, the Full Court could not have interfered. "Where evidence of service has been given, the District Court retains its jurisdiction."—*Stephen, C.J.*: *Ex parte Bucknell* (6 S.C.R. 96).

If a District Court Judge has some evidence of service and thinks it sufficient, that gives him jurisdiction, and no prohibition lies even if he is wrong: *Ex parte Hickey* (4 S.C.R. 23).

*Prendergast, C.J.*: "A ground for the prohibition (to the Magistrates' Court) was that he had not been served with the summons, but during the argument we intimated that in our opinion there was evidence before the magistrate of the service, and therefore, that this ground failed, even if the absence of all evidence of service would have prevented the magistrate from entertaining the case": *Finlay v. Bishop* (17 N.Z.L.R. 184).

Judgment passed against applicant on an affidavit by a bailiff of personal service. The bailiff made an affidavit on this application which showed that there had been no personal service. Prohibition was granted. It is a condition precedent to judgment that the summons be personally served: *Ex parte Campbell* (9 W.N. 208).

[But see cases under Part I., Chapter I., Condition Precedent, pp. 123 *et seq.*]

A District Court Judge made a garnishee order against applicant. The judgment creditor had filed the affidavits required by sec. 3 of Small Debts Recovery Act, including one to the effect that applicant resided within the jurisdiction of the Court. A prohibition was sought on the ground that he did not so reside, but refused, as the remedy was misconceived. "The affidavit that applicant did so reside was before the



Judge who made the order, and it is not for us on this motion to review his determination that applicant was resident within the jurisdiction. It is immaterial that applicant did not appear: he was summoned to appear, and as he did not do so, the District Court Judge decided in his absence": *Ex parte Adams* (10 N.S.W.R. 22).

Applicant applied for a prohibition on being served with a District Court summons for Albury Court. The summons described him as of Sydney. His affidavit showed he never resided in Albury (except temporarily) and never promised in writing to pay the debt there. "After a verdict in the District Court on the controverted points, affirming the jurisdiction, we should, on a similar motion, be compelled to decide, since a wrong finding on the facts by a subordinate tribunal cannot in any case give it jurisdiction."—*Stephen, C.J.*: *Ex parte Asher* (4 S.C.R. 71).

An order was made by justices under sec. 10 of 19 Vic. No. 24, for the return of a piano; the only evidence as to value was that it was worth "about £20." A prohibition was granted—there was no evidence before the magistrate to found his jurisdiction; in such a case it must be shown that the property was not of greater value than £20: *Compton v. MacDonnell* (5 S.C.R. (Q.) 197).

By sec. 45 of the Local Elections Act 1904, petitions in respect of irregularities in elections are to be presented at the nearest Magistrates' Court. A petition was presented at a hall which was occasionally used as a Magistrates' Court, and at the hearing the respondent objected that the hall was not a Magistrates' Court, but the magistrate decided that it was and decided the petition in favour of the petitioner. *Held*, that the decision of the magistrate was not final. *Per Denniston, J.* (in the Court below): "The question was not one of fact: that could only be if there was evidence which in any point of view would have made it possible to hold that there was a Court. A magistrate cannot give himself jurisdiction by deciding a point essential to his jurisdiction without evidence." *Per Stout, C.J.*, on appeal: "The magistrate cannot by declaring that a certain office is an office of the Court set aside the provisions of the statute and give himself jurisdiction. He cannot, by saying that there was an office there, if there was no office there, give himself jurisdiction to try the case. This is not a class of case where the facts are mixed up with the merits. This is a preliminary point which has to be determined before the jurisdiction arises." *Per Edwards, J.*: "Where there is a doubt about the facts, and evidence which would warrant a conclusion either way was given before the magistrate, his decision upon the facts would be conclusive. But that is not the case where—as here—it is plain upon the evidence given by



the party supporting the decision of the magistrate that there was not sufficient to justify the conclusion at which the magistrate arrived. In such a case, the question is not one of fact, but of law": *MacNamara v. Bell* (26 N.Z.L.R. 1231).

The payee of a promissory note payable on demand sued the maker in the Local Court at Adelaide. The note was signed at Nackara, within the territorial jurisdiction of the Local Court of Terowie. The defendant pleaded to the jurisdiction, but the Local Court decided that it had jurisdiction. It was *held*, on motion for a prohibition, that the whole cause of action—everything material for the plaintiff to prove—must have arisen within the jurisdiction of the Court in which the defendant was sued, in order to give that Court jurisdiction; the whole cause of action did not arise in Adelaide (see *Roff & another v. Miller*, 19 L.J.C.P.N.S. 278), nor did the original debt arise there, nor did correspondence put in evidence contain any admission of an account stated. "Mr. *Gepp* also contends that the finding of the Court that it had jurisdiction was sufficient, but it is not necessary to cite any case to answer that proposition, because there is a whole string of cases; in fact the whole law of prohibition goes upon the ground that the Court has assumed to itself a jurisdiction which it does not possess."—*Way*, C.J., and *Boucaut*, J.: *Brown v. Brown* (21 S.A.L.R. 140).

A plaint in a Small Debts Court was for "timber and boards sold and delivered by plaintiff to defendant," and claimed £27 19s. 5d. The evidence showed that the defendant had ordered the goods of plaintiff by sample, but refused to accept delivery as the goods were not according to sample. It was objected that there was no jurisdiction, as the action really was for damages, and not for debt, and the jurisdiction of the Small Debts Court in respect of claims for damages was only £10. *Cohen*, J.: "Where the question of jurisdiction depends on contested facts, this Court will not interfere to set aside the decision of fact arrived at by the lower Court. In this case the facts, as they appeared before the Court, were uncontested. Had there been contested facts as to the circumstances attending the delivery of the timber—if there had been evidence to show that the defendant accepted it—then it would have been impossible for me to interfere. But here, taking the plain undisputed facts, the Court below has clearly applied to them a wrong principle of law, and has so come to a wrong conclusion as to its jurisdiction": *Ex parte Ashe* (13 W.N. 76).

D. and B. were respectively first and second mortgagees of land D. sold under his power of sale, and B. sued him in a Magistrate's Court to recover £100 damages, on the ground that the land had been sold below its value and by the exercise of proper care a larger sum might

have been obtained. The magistrate held that the action was for a tort within the meaning of sec. 30 Magistrates' Courts Act 1893, and found for the plaintiff for £58 15s. 7d. A prohibition was granted—the action was not one of tort, and the magistrate had no jurisdiction: *Dawson v. Northcroft* (13 N.Z.L.R. 276).

If the lower Court on the evidence before it draws a wrong conclusion of law, that the defendant resides within its jurisdiction, prohibition lies: *Ex parte Baillie* (5 S.C.R. 17).

A schoolboy, residing at Newcastle, bought goods of the respondents, who sent in their bill to the mother, at her residence in Sydney. She wrote back a letter to the respondents, which the justices construed as containing a promise to pay at Newcastle (see sec. 2 of 55 Vic. No. 19, now 1899 No. 13, sec. 18). The mother was sued in Newcastle in the Small Debts Court, and a verdict given against her. *Stephen, J.*, granted a prohibition, but “had the defendant resided at Newcastle, I could not have interfered with their decision on the merits, however erroneous it might be, no appeal being allowed. But as the question of liability seems to determine the question of jurisdiction (which has not been disputed on the argument), I hold I am bound to interpret the letter, and if my view differs from that of the justices, to say that they are wrong and cannot give themselves jurisdiction by wrongly deciding. Had there been any conflict of testimony, there being evidence both ways, I could not have interfered even if I had taken a different view”: *Ex parte Young* (10 W.N. 200).

Defendant pleaded a *modus* in a suit for tithes, but the Ecclesiastical Court held the plea to be bad in form. A prohibition was granted—the plea was good in form, and the inferior Court had not jurisdiction to try the *modus*: *Darby v. Cosens* (1 T.R. 552).

“Misconstruction of an Act of Parliament as to a point of jurisdiction is matter of prohibition in an inferior Court, but misconstruction of an Act of Parliament upon a matter which is within that jurisdiction is matter of appeal.”—*Shortt* on Mandamus and Prohibition, 461, 462, citing *Brett, L.J.*, in *Denaby & Co. v. Manchester Railway Co.* (3 N. & M. Railway Cases 426).

Where the inferior Court in deciding whether or not it has jurisdiction, wrongly construes the statute on which its jurisdiction depends, its decision may be reviewed on prohibition: *Ex parte South Australian Brewing Co., Ltd.* (8 S.R. 361).

An Order in Council under sec. 51 of the Native Land Court Act 1886 empowered the Native Land Court to apportion certain lands among the descendants of a certain native and no others. “It was necessarily within the jurisdiction to decide upon the meaning of the

Order in Council; but if the Court had decided wrongly upon the meaning of the Order in Council, that would not have been conclusive; this Court would nevertheless have prohibited the Native Land Court from proceeding with the enquiry so far as concerned the claim put forward by the present defendants.”—*Prendergast, C.J.*, in *Wiremu Pomare v. Piukanana* (14 N.Z.L.R. 340).

A magistrate, in the course of holding an inquiry into a licensing poll under sub-sec. (c) of sec. 7 of the Alcoholic Liquors Sale Control Act Amendment Act 1895, proposed to exercise the powers of an Election Court under the Electoral Act 1902. It was *held* that the magistrate had no power to do so. “. . . If he has not this jurisdiction, can the prohibition claimed issue? There is always some difficulty in determining whether the question of jurisdiction is a preliminary question, or one involved in the merits. In this case the magistrate has stated that he intends to open the ballot-papers, on the ground that sub-sec. 6 gives him a jurisdiction. The words of the sub-section relied on are: ‘the Court shall have jurisdiction, &c.’ It is not, therefore, an erroneous decision in matter of law on the merits that is complained of. He might, for example, determine quite erroneously that a person entitled to vote was not so entitled, and this Court could not help the person deprived of his or her right. But that is not this case. He claims the jurisdiction granted to the Electoral Court by sub-sec. 6, and if he has not that jurisdiction, he would not do what he purports to do. I am of opinion, therefore, that it is really a pure question of jurisdiction this Court is called upon to decide. No doubt an erroneous decision of law is also involved, but the erroneous decision is on whether he has or has not the jurisdiction claimed. This case, therefore, appears to me one which is clearer as to the power of this Court to interfere by prohibition than in the cases of *In re Roche* (7 N.Z.L.R. 206); *In re Mangaohane Block* (9 N.Z.L.R. 731) and *Winiata te Wharo v. Airini Tonore* (11 N.Z.L.R. 209), and in my opinion the prohibition claimed should go.”—*Stout, C.J.*: *Bond v. Johnson* (22 N.Z.L.R. 695).

Where an Act (The Native Land Court Acts Amendment Act 1889, sec. 13) gave a Land Court power to remedy “any error or omission committed or made in any decision or order of the Court,” and that Court proceeded under that section to remedy a decision which expressed the real intention of the Court, but was in fact the result of a misapprehension in the mind of the Court, it was *held* that the Land Court had no power to remedy the decision under the section—the alleged error was not an error within the meaning of that section—and a prohibition was granted. “And we are satisfied that if it should appear on the face of the proceedings that a Judge of an inferior Court has in the course

of the proceedings misinterpreted the statute giving him jurisdiction, and thereby assumed a jurisdiction to do something not thereby authorised. he can be prohibited. In the present case, the Chief Judge (of the Native Land Court) is shown on the face of the proceedings to have declared the applicant and his followers to be owners of Mangaohane No. 2, on his own motion, without investigation, and consequently, without giving the parties whose interests are affected by such decision an opportunity of being heard. . . . To do this he has assumed a right to, in effect, constitute himself a Court for investigating titles. All this appears on the face of the proceedings, in the judgment of the Chief Judge, taken with the statement in the application that the Native Land Court had never determined the claims of the appellant and his followers to the land. In doing so, we think, as before said, that he misinterpreted the Act and thereby improperly assumed a jurisdiction not given him by the statute. *In many cases a prohibition on this ground would simply refer the matter to the Chief Judge* ; but in the present case he finds (and we think correctly) that no other order than that made by him is possible" : *Winiata te Wharo v. Airini Tonore* (14 N.Z.L.R. 209).

Licensed premises occupied two pieces of land ; the licensee was evicted by the owner of one portion, and the owner applied under sec. 48 The Licensing Act 1876 for a transfer of the license to him, and the magistrate decided to grant the transfer to him. A prohibition was sought to restrain the magistrate from signing a special certificate of transfer and from proceeding further in the matter of the application for such transfer, and the rule was made absolute : the tenant had only been evicted from portion of the licensed premises, and such eviction was not an eviction within sec. 48 Licensing Act so as to enable a magistrate to sanction a transfer : *In re Licensing Act 1876* ; *Ex parte Downton* (8 V.L.R.C.L. 198). [See No. 1111, sec. 102 ; No. 1364, sec. 3.]

Under the Licensing Act 1906, the Licenses Reduction Board is authorised to reduce the number of licenses in a district. In determining what licenses are to be cancelled, the Board is directed to deprive of licenses, firstly, houses against which convictions of a certain kind are recorded. *Held*, that the erroneous decision of the Board that certain convictions were of the class specified by the statute, was a decision on a preliminary to the exercise of jurisdiction, and not a mere erroneous decision on the merits, and that prohibition lay in respect of such decision. *Cussen, J.*, said : " I concur also in the view that prohibition would lie if the Board wrongly dealt with premises as if in class (a), when on the true construction of the statute they were not within it. The arguments which tell against the applicant on his first



contention tell in his favour on this point. The matter of granting prohibition turns here on the construction of the statute. Did the Legislature mean that if an hotel was not within class (a) the Board should not deal with it first; or was it intended that if the Board decided, however wrongly, that it was within the class, it should be so dealt with? I think the first is the true meaning, and that here the special direction to do one thing impliedly prohibits anything else. It is true the Board has general jurisdiction in the matter of reducing licenses, and that this question only arises after they have entered on the general inquiry. But that is not always an answer to an application for prohibition, and certainly is not if the Legislature intended, as I think it did here, that the proper settlement of this question should be an essential preliminary to the particular inquiry. The Board has, no doubt, to decide the question, but, notwithstanding what has been said in some cases, cannot give itself jurisdiction to deal with the premises in a special manner by deciding wrongly. The question turning in my opinion on the true construction of the statute, authorities are probably not necessary, but I may refer to *Thompson v. Ingham* (14 Q.B. 710); *Burder v. Veley* (12 Ad. & E. 265,) cited in *The Mayor, &c., of London v. Cox* (L.R. 2 H.L., at p. 270); *R. v. Tristram* ([1902] 1 K.B. 816); and *R. v. Woodhouse* ([1906] 2 K.B. 501). In the last-mentioned case there was some difference of opinion between the Lords Justices, and the actual decision has been set aside by the House of Lords, but both facts are unimportant so far as the present case is concerned. These cases show that a point preliminary to jurisdiction may arise during the course of a general inquiry, that when the decision is the gravamen of the complaint it may not be too late to ask for prohibition after a decision is given, and that prohibition will lie to a body such as the Licenses Reduction Board": *R. v. Licenses Reduction Board* (14 A.L.R. 7; [1908] V.L.R. 79; 29 A.L.T. 148).

Plaintiff contracted in Adelaide to build defendant a house at Border Town, the defendant residing at Port Pirie. The agreement provided that stone should be obtained from a place within two miles of Border Town, but during the work it was found that stone could not be obtained there, and had to be carted from a great distance. Plaintiff sued for extra cartage in the Narracoorte Local Court. There was some evidence to show an express agreement by defendant to pay for this extra cartage, and nothing to show where this agreement was made. Objection was taken to the jurisdiction on the ground that the action was not brought in the Court nearest to which the cause of action arose, or nearest to the defendant's residence, but the Court found for the plaintiff. The Narracoorte Court was not the nearest Court to the



defendant's residence ; consequently, if the action was on the contract made in Adelaide, the Local Court had no jurisdiction. " It was urged by Mr. *Nesbit* that the proviso to the 8th section of No. 12 of 1870, enabled the Court to give itself jurisdiction if the plaintiff had *reasonable grounds* for supposing that such Court had jurisdiction, and he said it must be presumed that the Court had come to that finding. But I agree with Mr. *Symon* that, as the only record on the magistrate's notes was that the objection was taken and overruled, and there being no record of any special finding that the Court proceeded on this ground, it cannot be assumed that it did so."—*Way, C.J. : McMullen v. McRae* (17 S.A.L.R. 93).

A summons in the Small Debts Court was served on a person as to whom there was evidence that he was a servant of the defendant. If so, the service was good. It was not decided in the Small Debts Court that this person was a servant, and a prohibition was granted. *Per Stephen, J. :* " The magistrates have not held as a fact that he was a servant. They have chosen to say that service on an agent was sufficient " : *Ex parte Williams* (4 W.N. 133).

Goods were bought by defendant from plaintiff, who sued for their price in the Leeds County Court. Objection being made that that Court had no jurisdiction, as the whole cause of action did not arise within the jurisdiction of the Leeds Court, inasmuch as the agreement stipulated for delivery at Manchester, where defendant resided, the Judge left it to the jury to say where delivery was agreed to be made. A prohibition was granted, as delivery was agreed to be made at Manchester. " . . . . When the Judge *left it to the jury* to say whether the goods were to be delivered at Leeds or Manchester, he, in fact, left to them the question whether he had jurisdiction or not. *That he could not properly do* " : *Jackson v. Beaumont* (11 Ex. 300).

## CHAPTER II.

## PROHIBITION IN AID.

“ Another class in which the exception must first be taken in the Court below is that in which there is general jurisdiction over the subject matter, but a defence is raised which the Court is incompetent to try, as where in a suit to repair a chancel the impropiator pleads a custom for the parish to repair, or raises a question of parish or no parish, which must be tried by a jury : see *Duke of Rutland v. Bagshaw* (14 Q.B. 869). In such a case the prohibition goes so soon as it appears that the special Court cannot proceed without trying the custom, or taking a step towards trying it, even though it be not yet in issue, or a plea thereof refused : *French v. Trask* (10 East 348) ; *Byerley v. Windus* (5 B. & C. 1). And in this class of cases the prohibition acts simply in aid of the special or inferior Court, by trying what that Court had no jurisdiction to try, and upon an affirmative decision the prohibition is absolute, but upon a negative decision there is a judgment of consultation, upon which the special or inferior Court proceeds with the case unhampered by the objection.”—*Willes, J.*, in *Mayor of London v. Cox* (L.R. 2 E. & I. at 276).

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*Illustrations.*

Defendant pleaded a *modus* to a suit for tithes, which plea the Ecclesiastical Court held insufficient. A prohibition was granted—the plea was good, and the Court had no jurisdiction to try the issue. “ The prohibition is merely for the purpose of trying the *modus* ; for the party applying must declare in prohibition, and, if the jury find against the *modus*, I take it a consultation goes of course.”—*Buller, J.* : *Darby v. Cosens* (1 T.R. 552).

After rule *nisi* for prohibition, it was moved that the suggestion was bad, because *modus* was suggested, and it is not suggested that they tendered the plea there and it was refused, but the rule was good, notwithstanding, because the Court will not intend that they will allow *modus* there : *Lush v. Webb* (1 Sid. 251).

Defendant was sued in the Spiritual Court for a tithe, to wit, certain turkeys ; he pleaded a *modus*, or custom, that the vicar was not entitled to a tithe of turkeys, but to “ 1d. for every turkey laying eggs, or to every tenth egg laid by such turkey, at the option of the vicar, in lieu thereof.” This plea being rejected by the Spiritual Court, a prohibition was sought, but refused : There should have been an allegation of the time at which the option was to be exercised, as there might be a change of vicars, and it would under such a *modus* as alleged be impossible to say which of the vicars should take the money : *Roberts v. Williams* (12 East. 32).

## CHAPTER III.

## NATURAL JUSTICE.

Prohibition lies where an inferior Court acts in a manner contrary to the principles of natural justice.

A Court acts in a manner contrary to natural justice when it fails to conduct its proceedings according to the rules which should govern the proceedings of all Courts.

But mere mistake of fact or law or error of procedure is no ground for prohibition.

“By far the greater part of the instances in our books in which prohibitions have issued, are cases of plain excess of jurisdiction, but some of the instances go beyond an excess of jurisdiction, and seem rather to fall under the head of wrong and injustice done to the party by refusing him, in the course of a proceeding strictly within the jurisdiction, some benefit or advantage to which the common or statute law entitled him, by which the general proceedings of those Courts are regulated.”—*Eyre, C.J., in Home v. Camden* (2 H. Bl. at 535).

“It seems to me that in taking the course they did, the bench acted altogether wrongly, and violated one of the first principles of natural justice—a principle embodied in the maxim *audi alteram partem*, and upon this ground the prohibition must be granted.”—*Windeyer, J., in In re Scadden* (16 N.S.W.R. 125).

“ . . . for this purpose we must endeavour to state the law of prohibition distinctly upon points which were

mixed up together in the discussion at the bar. As, for instance, it is obvious that our answer must be limited to cases in which there is an absence of jurisdiction, and the prohibition is asked for upon that ground, because there are exceptions which, from their very nature, must be first raised in the Court below. These occur in cases where there is jurisdiction over the subject matter, and in which, therefore, prohibition will not go for mere irregularity in the proceedings, or even a wrong decision of the merits : *Blaquiere v. Hawkins* (Doug. 378), but in which it will be granted for a denial or perversion of right, such, for instance, as refusal of a copy of the libel, in which case the prohibition is only *quousque* ; or refusal of a valid plea to a subject matter of complaint within the jurisdiction, in which case, although, if the plea had been received, it might have been tried in the Court below, yet, if it be refused, then, upon its validity and truth being established in the Court above, the prohibition is absolute : *White v. Steele* (12 C.B.N.S. 383). In these cases there is entire jurisdiction over the subject matter.”—*Willes, J.*, in *Cor v. Mayor, &c. of London* (1 L.R. 2 E. & I. at 276).

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“ Furthermore, I apprehend that if a Court takes upon itself, without authority, to alter the course of its procedure, and to create a new offence, as was here done by superadding monition to a definitive sentence, and converting a second and distinct act into the offence of contumacy, instead of dealing with it as a substantive offence, there arises in this respect, also, an excess of authority which we are called upon to prohibit. *Blackstone*, in 3 Com. c. 7, speaking of the Writ of Prohibition, says that ‘ it may be directed to the Courts Christian, where they concern themselves with any matter not within their jurisdiction, or if, in handling matters clearly within their cognisance, they transgress the bounds prescribed to them



by the laws of England, as where they require two witnesses to prove the payment of a legacy : in such cases also a prohibition will be awarded.' On the authority of the law as laid down by *Coleridge, J.*, in the case of *Jones v. Jones* (17 L.J.N.S.Q.B. 170), *Mr. Lloyd*, in his treatise on the Law of Prohibition, states that prohibition will lie in cases where the Judge of an inferior Court transgresses the rules which ought to govern the proceedings of all Courts, or is guilty of an irregularity which amounts to an excess of jurisdiction, though the case may otherwise be within his authority. In this view of the law I entirely concur, and I think it is applicable here. . . . and although, where a sentence of deprivation or suspension can be properly pronounced by the Ecclesiastical Court, this Court will not interfere, though the effect of such sentence will be indirectly to affect the interest in the freehold, yet where the sentence is not properly within the competence of such a Court, or applicable to the alleged offence, this Court becomes bound to protect the temporal interest by prohibiting the execution of the sentence."—*Cockburn, C.J.*, in *Martin v. Mackonochie* (3 Q.B.D. at 781).

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"When a prohibition is applied for, the applicant must show clearly that the Court to be prohibited is proceeding improperly, that is, without jurisdiction, or in a manner that is opposed to the principles of justice."—*Maule, J.*, in *Ex parte Story* (12 C.B. at 777).

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*Lush, J.*, after pointing out that the matters complained of were matters of procedure of the Court of Arches, and were, therefore, not subject to be interfered with by prohibition, added : "It is, of course, conceivable as a possibility, that a system of procedure might be so vicious as to violate some fundamental principle of justice ; as if,

for example, it allowed a suit to be instituted and prosecuted to judgment in the absence of the party sued, and without summoning him, or giving him any opportunity of defending himself. That would entitle this Court to interfere.”—*Martin v. Mackonochie* (3 Q.B.D. at 739). *On appeal, Thesiger, L.J.*, in 4 Q.B.D. at 732, said (after stating that prohibition does not lie in respect of matters of mere procedure, in respect of which, if the Judge errs, appeal and not prohibition would be the proper remedy) “unless his error involves the doing of something which, in the words of *Littledale, J.*, in *Ex parte Smyth* (3 A. & E. 719, 724), is ‘contrary to the general laws of the land,’ or, to use the language of *Lush, J.*, in the Court below, is ‘so vicious as to violate some fundamental principle of justice.’”

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“I think the term ‘natural justice,’ which has been used in reference to foreign judgments, refers rather to the form of procedure than to the merits of the particular case. If this were the case of a judgment obtained by reason of untrue statements contained in an affidavit in a foreign Court, where the procedure is contrary to natural justice, then we might refuse to give effect to that judgment; but if the procedure be not contrary to natural justice, the defendant has a remedy by an application to the foreign Court to get the proceedings set aside: so that in all cases there will be a remedy. If the proceedings be in accordance with the practice of the foreign Court, but that practice is not in accordance with natural justice, this Court will not allow itself to be concluded by them, but on the other hand, if the procedure be in accordance with natural justice, the foreign Court itself will interfere to prevent the plaintiff taking advantage of the judgment irregularly and improperly obtained. Of course, in the case of the procedure being contrary to natural justice, it would be

useless to go to the foreign Court and complain of its being so."—*Bramwell, B.*, in *Crawley v. Isaacs* (16 L.T. at 531).

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"It is said, however, that it (*i.e.*, what the Court of Arches had done) cannot be regarded as procedure only. Now that is a very difficult question to discuss. What is procedure, and therefore, if wrong, matter of appeal only ; and what is jurisdiction, and if wrongly asserted, matter for prohibition, is almost impossible to define in general language. The same thing will often strike different minds, some as error in procedure, some as excess of jurisdiction. I do not pretend to speak with confidence in a matter where so many of our colleagues differ from me, but I am unable to see that this is anything but procedure. The subject matter is clearly within the jurisdiction of the Court Christian. It matters not that, as has been suggested, Mr. Mackonochie might be indicted for breach of the statute law in ministering contrary to the Act of Uniformity. He is accused of an ecclesiastical offence. The punishment is one which for this offence the Court Christian may inflict. It is said that it has been arrived at by a wrong process. I do not think so ; but if it has, what is arriving at a legitimate end by a wrong road but erroneous procedure ? In *Ex parte Smyth* (3 A. & E. 719) the Court of Appeal decided something not matter of appeal, and on which the appellant had not been heard : *Held*, procedure. In *Couch v. Toll* (March 98), the Court had proceeded then to sentence, without any citation of the person sentenced. *Held* that, whether citation was needful for the practice of the Court or not, it was error in procedure, and not matter for prohibition. In *Shatter v. Friend* (1 Sho. 158, 172), the prohibition went because the Judges thought the matter a temporal one—it was a question of proof of payment by a single witness ; but it was admitted that if the matter was ecclesiastical the

prohibition would have been refused; and Lord *Holt* doubted, though he ultimately concurred with the rest of the Court, and admitted that the resolution of all the Judges (reported by Lord *Coke*, in 2nd Inst. 608) was ‘mighty strong’ with his doubt, as indeed, says Sir *Bartholomew Shower*, it certainly was. In *Breedon v. Hill* (1 Ld. Ray. 221), Lord *Holt* lays down the principle in these terms: ‘When the Ecclesiastical Courts are possessed of a cause which is merely of spiritual cognisance, the Courts of Common Law allow them to pursue their own methods in the determination of it.’ In *Rex v. Payton* (7 T.R. 153), one of the grounds of the prohibition (the other two not being material here) was, that the Ecclesiastical Court had pronounced a sentence not warranted by law or practice; but Lord *Kenyon* said, delivering the judgment of the Court (himself, *Grose*, and *Lawrence*, JJ.): ‘that it is only a ground of appeal; it is merely that the Judge has not proceeded according to the proper forms of the Ecclesiastical Court.’ In *Ackerley v. Parkinson* (3 M. & S. 411) the question was not one directly of prohibition, but it was an action against ecclesiastical Judges for proceeding to sentence in a cause begun by a citation, which, as the delegates determined, was a nullity. It was held, nevertheless, that the proceedings, though erroneous, were not without jurisdiction, and *Bayley*, J., at p. 428, makes these, to my mind, very pertinent remarks: ‘This is a matter which they must know as connected with their practice; but how are we as Judges of the common law to know whether these proceedings have been such as the writ or canon law requires? Our knowledge of what is conformable or not to that law is chiefly derived from our practice of exercising jurisdiction over those Courts in the matter of granting prohibitions. If it appears that the ecclesiastical Judge had either no jurisdiction, or has exceeded his jurisdiction, this Court is in the habit of interfering by granting a prohibition. But if the spiritual

Court has jurisdiction (*Le Blanc*, J., explains this by saying 'over the subject matter') I am not aware of any instance in which this Court has granted a prohibition, except in cases where it proceeds to trial of a matter triable only by the common law, or allows a thing not allowed by the common law, or where the construction of a statute, which is peculiarly confined to the common law, comes in question.' Subject to the argument arising on the Church Discipline Act, every word of this appears to me in point in this case. In *Ex parte Story* (8 Ex. 195) a prohibition was prayed for to restrain the Ecclesiastical Court from proceeding to punish a man for disobedience to decrees made behind his back and without notice. But Lord *Wensleydale* said : ' There is no doubt that here the Ecclesiastical Court has jurisdiction over the suit ; but if any proceeding of an irregular nature has taken place in that suit, it does not take away the jurisdiction of the Court, but merely gives the party a remedy by application to the Court itself, or by appeal. What has been done in this case does not amount to a contravention of natural justice.' In *re Crawford* (13 Q.B. 613), was not a case of prohibition, but of refusing, or rather setting aside, a *habeas corpus* ; but it is worth notice as showing that the Courts at Westminster will not interfere with the procedure of other Courts (the Court in question was the Chancery of the Isle of Man) although such procedure would not be lawful if pursued by themselves. Of course, in none of these cases were the circumstances exactly the same as the circumstances in the cases before us. If they were, the arguments of counsel, and our judgments, would have been short indeed ; but I think they establish this, that where the subject matter is for the Court Christian, and where the act done is something which the Court Christian can itself do, the steps by which the Court arrives at the act, however erroneous they may be, are matters of appeal and not ground of prohibition. I have said that I think



the steps in this case right, but if I thought them wrong, my conclusion would be the same. It is said, however, that if the procedure involves something contrary to natural justice, the Court will be prohibited; and I agree it will, and ought to be." [His Lordship then proceeded to state reasons for holding that the procedure followed was not in fact contrary to natural justice. *Cockburn*, C.J., in 3 Q.B.D. at 777, gives reasons for holding that it was in fact contrary to natural justice.] *Coleridge*, C.J., in *Martin v. Mackonochie* (4 Q.B.D. 786-788).

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"For however erroneous the judgment may be in law, or whatever injustice that erroneous judgment may inflict, the erroneousness or injustice of the judgment does not make the judgment contrary to natural justice. A decision contrary to natural justice is where the presiding Judge or magistrate denies to a litigant some right or privilege or benefit to which he is entitled in the ordinary course of the proceedings, as for instance, where a magistrate refuses to allow a litigant to address the Court, or where he refuses to allow a witness to be cross-examined, or cases of that kind. That conduct is said to be contrary to natural justice, and is a ground for the interference of this Court." —*Owen*, J., in *Ex parte Fealey* (18 N.S.W.R. 282).

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"The ground that a decision is against natural justice is an elastic one, and for that reason care should be taken that it is not unduly expanded. That a decision is against natural justice does not mean merely that it is against evidence or that it is wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the Judge who decided it." —*O'Connor*, J., in *Ex parte Mansfield* (20 N.S.W.R. 75).

“ The authority to grant prohibition is based upon the principle that it is the duty of the Crown to keep all Courts within the limits of jurisdiction prescribed to them by the statute law, and unless that jurisdiction is exceeded, or unless in the determination of the matter properly before it the Court has acted in a manner contrary to natural justice, prohibition will not issue.”—*Burnside, J.*, in *The Coastal Boilermakers’ Industrial Union v. Millar’s Karri & Jarrah Co., Ltd.* (7 W.A.L.R. 288).

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“ This was a prohibition against a Court, not against justices sitting in Petty Sessions, and was made under the general common law jurisdiction of this Court to restrain all inferior Courts within the limits of their jurisdiction. We only interfere on two grounds—where there is want of jurisdiction, and where the proceedings have been against natural justice. I acted in this case upon the second of these principles and granted the prohibition on the ground that the justices refused to allow the defendant to plead or his attorney to cross-examine the witnesses.”—*Hargrave, J.*, in *Ex parte McShane* (1 S.C.R. N.S. 10).

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“ There is no question of jurisdiction here, the only question being whether the action of the magistrate was opposed to the fundamental principles of justice. That is a ground for a prohibition, and if I saw that there had been anything of that kind I should not hesitate to grant the application.”—*Sir W. Manning*, in *Ex parte Fox* (2 S.C.R.N.S. 47).

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“ When an inferior Court is proceeding in a matter within its jurisdiction, prohibition will not go merely because the decision can be shown to be based on error in law or fact, or where there is mere irregularity in the

procedure : *Reg. v. Bolton* (10 L.J.M.C. 49) ; *In re Roche* (7 N.Z.L.R. 206). But if in such a case a Judge were to act in a manner contrary to what may be called natural justice—such as declining to allow one side to be heard, or in direct defiance of the procedure prescribed by the statute which gives him jurisdiction—as if he were to try a cause alone, where the statute prescribed a jury—we are satisfied he could be prohibited. That seems to us the effect of the judgment in this Court in *In re The Manguohane Block* (9 N.Z.L.R. 731), where the Court treated the refusal of a rehearing without hearing the applicant, as no rehearing.”—Full Court in *Winiata te Wharo v. Airini Tonore* (14 N.Z.L.R. 209).

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“ By sec. 32, Industrial Arbitration Act (1901 No. 59), no power exists of appeal, or review of its decisions, always supposing, of course, they are within its jurisdiction, and not contrary to natural justice.”—*Isaacs, J.*, in *Master Undertakers, &c. v. Crockett* (5 C.L.R. at 395).

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“ If this Court is of opinion that any decision of an inferior Court is against natural justice, a prohibition will lie, just in the same way as if the Court had acted without jurisdiction. In dealing with an application for a prohibition, however, this Court will not interfere because the inferior Court has made a mistake in law. In the case of an appeal from an inferior Court, if the appellant can satisfy the Court that the inferior Court has acted contrary to law, then the appellant will succeed. And if an inferior Court, though it has jurisdiction over the subject matter, and over the person, acts without any evidence before it and decides that a person is liable when no liability exists, the superior Court will grant a prohibition on the ground that the decision of the inferior Court is contrary to natural justice. But where there is a *prima facie* case made out

that the liability exists and there is evidence upon which the inferior tribunal would be justified in acting, it cannot be said that its decision is contrary to natural justice. . . . Without expressing any opinion as to whether or not the applicant was liable as a matter of law . . . to pay this amount (for I think it is unnecessary to decide that point) I am content to rest my judgment on this part of the case, that the decision, whether right or wrong, cannot be said to be contrary to natural justice.”—*G. B. Simpson, J.*, in *Ex parte Mansfield* (20 N.S.W.R. 75).

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“ If it is clear on the face of the proceedings that there is no obligation on the part of the defendants to pay money which the magistrate has ordered them to pay, then the verdict is against natural justice.”—*Windeyer, J.*, in *Purcell v. P. T. Company, Ltd.* (15 N.S.W.R. 385).

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“ Without defining what is the meaning of the term ‘ contrary to natural justice,’ it seems to me that by analogy to the rule in granting a new trial on the ground that the verdict is against evidence, where the Court will not act unless the verdict is demonstrably wrong, and such as no reasonable men could have found, the Court will not grant a prohibition on the ground that the decision is contrary to natural justice unless it sees that the justice has acted without any evidence before him, or unless his decision is so flagrantly wrong that it shows that he has not exercised the judicial functions cast upon him.”—*A. H. Simpson, J.*, in *Ex parte Mansfield* (20 N.S.W.R. 75).

“ If this Court is of opinion that any decision of an inferior Court is against natural justice, a prohibition will lie just in the same way as if the Court had acted without jurisdiction. . . . And if an inferior Court, though it has jurisdiction over the subject matter and over the person,

acts without any evidence before it and decides that a person is liable when no liability exists, the superior Court will grant a prohibition on the ground that the decision of the inferior Court is contrary to natural justice.”—*G. B. Simpson, J.*, in *Ex parte Mansfield* (20 N.S.W.R. 75).

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“I should like to say one word as to my decision in *In re Karett* (7 W.N. 5). The point there taken was that the Judge had no jurisdiction to make the order for the issue of the writ of *ca. sa.* if there was no evidence before him upon which to found the order. It seems to have been assumed by counsel on both sides that the Judge had no jurisdiction if there was no evidence before him, and I seem to have decided the case on that point. I should, however, be more satisfied if it had been decided on the ground that it was contrary to natural justice for the Judge to make the order without evidence before him.”—*Stephen, J.*, in *Ex parte Jordan* (19 N.S.W.R. 25).

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#### *Illustrations.*

1. Party not heard, p. 215.
  2. Complaint, &c., disclosing no cause of action, p. 222.
  3. Information, &c., disclosing no offence, p. 222.
  4. Insufficient evidence—Finding against evidence, p. 222.
  5. Improper reception and rejection of evidence, p. 230.
  6. *Mala fide* prosecutions, p. 234.
  7. Actions by and against wrong parties, p. 236.
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#### *1. Party not heard.*

A. was illegally arrested on warrant and brought before justices who made an order for A.'s discharge, but, on being pressed by the complainant, then inflicted a fine of one shilling—refusing to hear



evidence for the defence. A prohibition was granted: "As it is very important that every defendant, and especially one illegally in custody, should be heard in defence, I think the prohibition must go": *Re Oakley* (Tarl. T.R. 148).

Justices, in the absence of the defendant, adjourned a case for an hour, and then decided to hear it *ex parte*. While taking evidence *ex parte*, the defendant appeared and wished to conduct his defence, but the justices said that they had already decided to deal with the case *ex parte*, and declined to hear him. An order was made in favour of the plaintiff. A prohibition was granted—"The mistake was on the very threshold of justice, and was a flagrant violation of the maxim '*audi alteram partem*'": *In re Starr* (12 W.N. 172 n).

Applicant had given notice of defence that he had become insolvent since contracting the debt sued for, and had obtained a certificate of discharge. The magistrate refused to allow him to give evidence of such defence. A prohibition was granted: *Ex parte Cripps* (4 W.N. 68). Cf. *Still v. Booth* (1 L.M. & P. 440).

On application under sec. 33 Licensing Act for a license, a licensing inspector took certain objections under sec. 36, one being that the reasonable requirements of the neighbourhood did not justify the granting of such license. The bench refused to hear the evidence he wished to offer, stating that they had a personal knowledge of the locality, and a judicial knowledge of the evidence given on another application in respect of the same premises. They granted the application. A prohibition was granted. *Windeyer, J.*: "It seems to me that in taking the course they did, the Bench acted altogether wrongly, and violated one of the first principles of natural justice, a principle embodied in the maxim *audi alteram partem*, and upon this ground the prohibition must be granted": *In re Scadden* (16 N.S.W.R. 125).

Magistrates refused to allow a prisoner arrested under the Fugitive Offenders Act 1881, to give evidence to show that the case was a trivial one and that the application was not *bona fide* (see sec. 19) and the magistrate made an order remanding the prisoner to Queensland. A prohibition was granted: *Regina v. Smith* (10 W.N. 171).

Applicant claimed wages from defendant in a Small Debts Court as a tank sinker. He proved his case in chief, and defendant then gave evidence of a custom in the district that tank sinkers were only paid for the days they actually worked, and that applicant only worked a certain number of days; applicant proposed to give evidence in reply, that there was no such custom, but the magistrates refused him leave, holding that such evidence should have been given by him in chief. A prohibition was granted: "The magistrates were clearly wrong in

not allowing the complainant to go into evidence in reply. It is not a case of mere discretion. Of course the Court would be loth to interfere where evidence was given in reply. But it is altogether different where the evidence in reply is not allowed to be given.”—*Windeyer, J.* : *In re O’Lachlan* (3 W.N. 54).

Applicant was charged before justices with an offence under sec. 44 of the Municipalities Act 1897. At the close of the case for the prosecution, both parties addressed the Court and the magistrate held in favour of the prosecutor. The applicant then wished to give evidence and call witnesses, but the magistrate refused to allow it, on the ground that he had concluded his case. It was *held* to be clearly a misunderstanding between the magistrate and the applicant, and the Court granted a prohibition on the ground that the magistrate ought to have heard the applicant if he wished to give evidence in his own behalf : *Ex parte Lucas* (16 W.N. 51).

Certain proceedings in insolvency were had before a magistrate, who ordered a party interested to be excluded from the Court during the examination of witnesses. *Lilley, J.*, made an order quashing the examination—the magistrate was in error in excluding him from the Court : *Re J. & G. Harris* (1 Q.L.R. Pt. I. 70).

A defendant was served with a Small Debts Court summons requiring him, if he intended to defend on “any matter of excuse or set-off,” to file particulars within two clear days before the hearing. Applicant filed a defence of never indebted after the time so limited, and justices refused to allow him to give evidence. Rule *nisi* on the ground that the rules of Court whereby the period of two days was fixed were invalid as not being made according to the statute, and the refusal to allow him to give evidence was against natural justice. It was argued that prohibition would only be granted if the justices exceeded their jurisdiction, but *Stephen, J.* : “A prohibition will also be granted where they have acted contrary to natural justice.” *Held*, that the Registrar had no power to fill in the blank in the summons with the words “two clear days,” and therefore that the magistrate was in error in refusing to allow defendant to give evidence. *Held*, also, “never indebted” is not “excuse or set off” : *Ex parte Farlow* (13 N.S.W.R. 201).

*Martin, C.J.* : “I am of opinion that the refusal to hear Mr. *Wisdom* (counsel) in the absence of Mr. *Thackeray*, would have been no ground for a prohibition. No doubt it is one of the first principles of justice that no man should be condemned without being heard. But in the absence of any common law right or statutory provision, no one has a right to be heard by counsel. . . . The right to be heard is one thing,

the manner of the hearing is another.”—*Ex parte Thackeray* (13 S.C.R. 1, at p. 15).

A tradesman, resident in Cambridge, violated a decree of the University requiring tradesmen with whom a person in *statu pupillari* had contracted a debt exceeding £5 to send notice to such person's college tutor, and was summoned to show cause before the Vice-Chancellor why he should not be discommuned. *Held*, that as the proceedings were not judicial proceedings, he had no right to be heard by counsel or attorney : *Ex parte Death* (18 Q.B. 647 ; 21 L.J.Q.B. 337).

In proceedings under the Infant Protection Act, 1904 No. 27, sec. 9, the defendant was refused the right to appear by a solicitor. A prohibition was granted on the ground that the refusal was against natural justice : *Ex parte Jones* (24 W.N. 155).

A prohibition was sought on the ground that the justices refused to hear the defence. What they did was to ask the line of defence, and, on hearing it, intimate that it was, in their opinion, no defence, and refuse to hear it. *Lutwyche, J.*, strongly deprecated the making of such charges against justices, and *held* that they were in fact quite within their rights ; but “ if it had been proved that they had refused to hear more than one side, the Court would not only have been justified in making the rule absolute against them with costs, but would have been bound to do so.” : *Thorn v. Gray* (3 S.C.R. (Q.) 210).

Applicant was convicted under sec. 3 of Licensing Act (25 Vic. No. 14), for selling liquor without a license. He tendered no evidence, and was not informed that he had the right to do so if he wished. A prohibition was sought on the ground that the magistrates should have informed him that he had the right to give evidence. The Court said : “ It is not the duty of the magistrate to instruct defendants how to conduct their defences. The defendant did not make any application to give evidence ; but he was not told that he could not do so ” : *Ex parte Webb* (14 S.C.R. 270).

A summons under the Imprisonment for Debt Limitation Act 1903, sec. 2 (Consolidated Act 1908, sec. 8) was taken out against a debtor on two grounds, first, that the debt was contracted by fraud, and, second, that the debtor had means to pay the debt, but had failed to do so. At the hearing the charge of fraud was dropped, but evidence was tendered by the debtor in denial of the allegation of fraud. This evidence the magistrate refused to hear, and made the order on the other ground. *Held*, that the rejection of such evidence was not against natural justice : *Searl v. McArthur* (11 N.Z. Gaz. L.R. 179).

Plaintiff sued A. in the Mayor's Court, but served no process upon him ; plaintiff then garnisheed a bank which had funds of A. in its

hands, and the bank declared in prohibition against the Mayor's Court and the plaintiff. It was pleaded to the declaration in prohibition that there was a custom in the Mayor's Court, after certain formalities had been complied with, to give judgment on an attachment without the defendant having been summoned. A prohibition was granted—the Mayor's Court ought not to have decided against A. without giving him an opportunity to be heard: *London Joint Stock Bank v. Mayor of London* (5 C.P.D. 494).

A summons under the Deserted Wives and Children Act was heard and an order made before return day in the absence of the defendant. A prohibition was granted: *Ex parte Maguire* (19 W.N. 157).

A canal company was by an Act of 1846 authorised to make certain specified charges for goods traffic. This company's canal was one in a link of canals. A railway company guaranteed an income to the canal company. The Railway Commissioners, under sec. 11 Regulation of Railways Act 1873, made an order for through rates through the canals, the effect of which was to reduce below their statutory rate the rates chargeable by the canal company. The Railway company in question was not represented before the Commissioners, and did not consent to the order or to any variation of the tolls. A prohibition was granted by *Kelly, C.B., Pollock, B., and Hawkins, J. Kelly, C.B.*, granted it on the ground that, as the company had no notice of the proceedings, the order "was opposed to the first principles of the law and to justice." He added that "the order was against law and justice, and made without jurisdiction and must be set aside": *Warwick Canal Co. v. Birmingham Canal Co.* (5 Ex. D. 1).

A. imported goods and paid duty on them and sold to B. The Customs authorities claimed more duty, and, on its not being paid, summoned A. to show cause why they should not be forfeited under the Customs Act. An order of forfeiture was made without B. having any notice. A prohibition was asked on the ground that the order was against natural justice: *Ex parte Story* (12 C.B. 767). It was objected that the failure to give notice to B. arose from a misconstruction of the statute governing the matter, and that the justices had jurisdiction to misconstrue the statute. *Fellows, J.*: "But the misconstruction of the Act does not arise in the progress of the case. It is at the very outset and has the effect of preventing the defendant being heard. I think the prohibition should go": *R. v. Call; Ex parte Callaghan* (5 A.J.R. 91).

The applicant, master of a ship, was summoned by the Marine Board to an inquiry as to the stranding of the ship. He attended and gave evidence, and afterwards the Board, without giving him any notice

that his conduct as master was to be the subject of enquiry, cancelled his certificate. A prohibition was granted—"To found the jurisdiction of any Court there must be a specific charge."—*Lilley*, C.J. ". . . the law of natural justice must be followed under this statute (31 Vic. No. 3) as well as in all other cases in which Courts exercise jurisdiction."—*Harding*, J. ". . . and he must (*i.e.*, under the statute) also have an opportunity of clearing himself from the charges at a regularly conducted investigation. That was not done in the present case; and the decision of the Board, therefore, cannot stand."—*Mein*, J. *Re Hummel* (3 Q.L.J. 50).

Applicant was ordered by a justice to pay a sum of money under a conviction under Licensing Act "to be recovered by levy and distress." He did not pay the fine. A distress warrant was issued and returned "*nulla bona*." A warrant was issued for committal to gaol under sec. 91 (45 Vic. No. 14) without his being called on to show cause why he should not be committed to prison. *Stephen*, J., pointed out that the 21st sec. Justices Act (11 & 12 Vic. c. 43) is sufficiently explicit that the committal may take place on the return of *nulla bona*. "Nothing is said about showing cause, and I am unable to see any valid reason for such a condition being imported." His Honour was at first impressed with the view that it is contrary to the ordinary principles of law and justice that a man should be subjected to imprisonment without notice or summons to show cause. "But the applicant here knew of the penalty for non-payment, and what cause could he have to show? He could not question the truth of the return, nor could he set up payment of part of the fine, as a penalty is entire, and an apportionment of the term of imprisonment could not be obtained": *Ex parte Gannon* (8 W.N. 51).

A bishop had inhibited a clergyman from officiating as such, and had *then* given him a summons to appear before him and show cause why his license should not be revoked. *Cheeke*, J., at 96: ". . . still, when was the summons issued? Not, as before remarked, until the bishop had distinctly inhibited Mr. T. from the duties of his church, and without notice or cause shown: consequently, by so proceeding, in my opinion, such actions of the bishop can only legally and equitably be construed under the authorities cited as acts and conduct contrary to the principles of natural justice": *Ex parte Thackeray* (13 S.C.R. 1, at p. 96).

An order of justices made *ex parte*, which should have been made on notice, is made without jurisdiction, and proceedings thereon may be restrained by prohibition: *Mayor, &c., of Perth v. Green* (9 W.A. L.R. 148).



On the admission by the execution creditor of the title of the claimant in interpleader, the magistrate, under O. 26, rr. 3, 4, may make an order for costs. *Held*, that the making of such an order *ex parte*, was a mere irregularity, and not the subject of a prohibition: *Thom v. Hanlon* (10 W.A.L.R. 78).

A magistrate made an order against the applicant in the latter's absence and without notice to him. A prohibition was granted on the ground that the making of the order was contrary to natural justice: *Ex parte Warren* (23 W.N. 149).

It was held on prohibition that under the Lunacy Act, No. 309, magistrates cannot issue a distress warrant against a shire council to enforce payment of the expenses of examining and removing a lunatic without first giving the council affected an opportunity of being heard against the payment. A prohibition was granted to restrain an order for distress for non-payment under an order made *ex parte*: *Regina v. Panton* (6 W.W. & A.C.L. 6).

A party was duly cited, appeared, and was heard in the spiritual Court. At a subsequent time, two decrees were made against him in his absence and without notice to him. He sought prohibition on the ground that the decrees were, therefore, contrary to natural justice, but it was *held* not to be contrary to natural justice. "In the first part of the proceedings in the suit Mr. Story was present. He does not appear to have had a special notice that a decree was about to be pronounced; and if, by the practice of the Ecclesiastical Court, such notice was necessary and was not given, that forms a ground of application to that Court; but it may be that the parties are bound to take notice of the judgments pronounced by the Court, as is the case in the superior Courts": *Ex parte Story* (8 Ex. 195).

A debtor summoned under Act No. 284, sec. 2, is bound to attend the Court, or send a sufficient excuse, though no sum has been tendered to him for expenses. Where an order was made in his absence against a defendant so summoned, a prohibition was refused: *Ex parte Aplin*; *Re Livingstone v. Aplin* (4 V.L.R.C.L. 67). [See No. 1100, sec. 4.]

Where an owner or occupier of licensed premises is summoned under the Licensing Act 1907 to show cause why such premises should not be deprived of a license, the Licenses Reduction Board should hear the owners and occupiers of other premises if their interests are in direct antagonism to those of the person whose case the Board is considering. Where this was not done a prohibition was granted. *à Beckett, J.*: "As to the form, the order seeks a prohibition, and only in the alternative a *certiorari*, as to which there is a statutory obstruction which does not exist with regard to prohibition. In a case such

as this, where a judicial body has disregarded some manifest right possessed by a litigant before it, which would affect its decision, any steps following a disregard of that plain rule of law may, according to the authorities be restrained by prohibition. Therefore it is made absolute as to prohibition." *Hood, J.*, said that the refusal to hear was a denial of justice : *R. v. Licenses Reduction Board* (1909 V.L.R. 327 ; 30 A.L.T. 223 ; 15 A.L.R. 282).

2. *Plaint, &c., disclosing no cause of action*.—See Part I., Chapter II., p. 101.

3. *Information, &c., disclosing no offence*.—See Part I., Chapter I., p. 107.

4. *Insufficient evidence.—Finding against evidence*.

Defendant was sued in the County Court in the double capacity of executor of A. and administrator of B., and though he objected that the plaintiffs ought to elect in which capacity they sued him, the County Court gave judgment for the plaintiffs generally. A prohibition was refused—"It may be that the decision was erroneous ; but even in a case where there is not a particle of evidence to support the decision, still, if the County Court has jurisdiction, that is no ground for a prohibition."—*Pollock, C.B. : Guardians, &c., of Lexden v. Southgate* (10 Ex. 201).

"As to prohibition, I think it is not applicable. This is a remedy applicable in cases where justices have exceeded their jurisdiction in the order they have made, but here the order made was one which they had full authority to make—there are several cases showing that where justices, having jurisdiction, make mistakes in exercising their jurisdiction, this Court will not interfere by prohibition, and indeed, in one case where justices, having power to make an order, did so without any evidence at all to support their order, it was *held* that prohibition was not the proper remedy."—*Real, J.*, in *R. v. Roma Licensing Authority* (1908 S.R. (Q.) 97 ; Q.W.N. 27 ; 2 Q.J.P.R. 23).

The Imprisonment for Debt Limitation Act 1903, sec. 2 (Consolidated Act, 1908, sec. 8), throws upon the debtor the onus of explaining his position as to means, and if a magistrate, having considered the question, comes to a conclusion honestly and properly upon the subject, whether any evidence was called or not, the Supreme Court cannot interfere with his decision. "This is an application for a writ of prohibition on the ground that the magistrate acted without jurisdiction. . . . It is to be tested as a question of jurisdiction. . . . In a motion for prohibition the Court can only interfere when it is made clear that the magistrate . . . has acted not only erroneously on the balance of testimony, but has acted, practically speaking,

without any ground whatever to justify the course he has taken": *Searl v. McArthur* (11 N.Z. Gaz. L.R. 179).

*Darley*, C.J., in the course of argument said: "There are several cases where this Court has granted a prohibition to Courts of Petty Sessions on the ground that there was no evidence to support their finding." A prohibition was asked on the ground that a District Court Judge granted a *ca. sa.* on the ground that applicant had means to pay the judgment, whereas there was no evidence that he had means, but the Court *held* that the evidence which the District Court Judge had before him justified him in deciding that applicant had means. Another point was that applicant was not summoned, but it was *held* that this was not necessary in this Court; though if it had been necessary, the Court seemed inclined to grant prohibition. The Court followed *Ex parte Gunn* (Tarl. 29). "It appears to me, therefore, that the Judge had jurisdiction to entertain the application, although no summons had been issued, and further, that his Honour had evidence before him which justified him in coming to the conclusion that applicant had means."—*Darley*, C.J. *Stephen*, J.: "I should like to say one word as to my decision in the case of *In re Karett* (7 W.N. 5). The point there taken was that the Judge had no jurisdiction to make the order for the issue of the writ of *ca. sa.*, if there was no evidence before him on which to found the order. It seems to have been assumed by counsel on both sides that the Judge had no jurisdiction if there was no evidence before him, and I seem to have decided the case on that point. I should, however, be more satisfied if it had been decided on the ground that it was contrary to natural justice for the Judge to make the order without evidence before him": *Ex parte Jordan* (19 N.S.W.R. 25). And see *Ex parte Gee* (6 S.C.R. 355); *Woods v. Waterman* (10 W.A.L.R. 75).

A County Court jury gave a verdict for defendants. Plaintiff's counsel thereupon applied for a new trial, on the ground of surprise, and that the verdict was against evidence, but this was refused. The plaintiff's counsel then applied for a new trial on the ground of misconduct of a juror, and this was granted. *Esher*, M.R., *held* that there was no evidence on which a reasonable man could have found misconduct of the juror, but *Fry*, and *Lopes*, L.JJ., thought there was some slight evidence. However, the Court agreed that even if there was no evidence on which to found the order, that was no ground for prohibition, the matter being within the jurisdiction of the County Court: *R. v. Judge of Greenwich County Court* (60 L.T. 248).

"I feel disinclined to grant a prohibition in a case where the facts are in doubt, and the Court, whose jurisdiction is sought to be impeached, is just as competent to determine the facts as we are. If the Court

finds contrary to the evidence in order to give itself jurisdiction, this Court would not be bound by its authority, or if it gave a manifestly erroneous decision, although not for the purpose of giving itself jurisdiction, this Court would be entitled to look into the circumstances. But both facts and law are within the jurisdiction of the Court of Admiralty, and that Court is perfectly competent to decide them.”—*Cockburn, C.J.*, in *The Charkieh* (L.R. 8 Q.B. at 200).

“Thus, even if it were a good ground for a common law prohibition, ‘that upon the evidence and finding of the magistrate the applicant should not have been convicted,’ this Court would not interfere if there were evidence before the magistrate upon which he could have acted, and in my opinion there was such evidence before him. There was evidence before him which justified the magistrate in coming to the conclusion that the goods were fraudulently removed to avoid distress. . . . It is quite clear, as *Faucett, J.*, said in *Ex parte Muir* (2 S.C.R.N.S. 216), that where there is a conflict of testimony as to what a magistrate says in giving his decision, this Court cannot pay any attention to the statements made on one side or the other, though it is clear that if a magistrate does something contrary to law when he convicts a person, then this Court would grant a prohibition under the Justices Acts. Therefore, as there is this conflict of testimony as to what the magistrate said, this Court could not interfere even if this point were properly before us.”—*G. B. Simpson, J.*: *Ex parte Mumby* (15 W.N. 209).

Applicant’s license was cancelled by justices under the Licensing Act for not having the accommodation required by that Act. On motion for prohibition, *Innes, J.*: “So far as the information and summons are concerned, the case appears to have been properly initiated, but the Licensing Bench have apparently cancelled the applicant’s license without taking any depositions or any evidence on oath in support of the complaint. It is necessary, under sec. 72 (iv.) before the Court can cancel a license, that the holder should be proved to have committed an offence punishable by cancellation, and the depositions must show that such an offence has been proved. These depositions show nothing of the sort, and we cannot supplement them by looking at any affidavits. The depositions must show that the charge has been made out:” *Ex parte Whelan* (8 W.N. 50).

A Marine Board inquiry was held into a collision between two ships. After the inquiry the secretary of the Board wrote to Burrey, third mate of one of the ships, stating that the Board found that he was in default, and calling upon him to show cause why his certificate should not be suspended. Burrey received, along with the letter from

the secretary, a statement of the case upon which the inquiry had been ordered. At the second inquiry, at which Burrey attended to show cause, the Board acted upon the evidence given at the first inquiry, and Burrey had no opportunity of cross-examining the witnesses. Burrey's certificate was suspended by the Board. A prohibition was granted by the Court (*Lilley, C.J., Harding and Real, J.J.*). *Harding, J.* : "In every judicial proceeding where a man's conduct was called into question, he must be first of all charged. . . . Having been properly charged, then the charging party had, by judicial evidence, to make out the case against him. That was to say, according to our law, there must be sworn testimony given in the presence of the accused, with the opportunity afforded him to cross-examine witnesses immediately after they had given their testimony." His Honour then examined the Navigation Act (41 Vic. No. 3), and *held* that, as this second inquiry was a new inquiry, no witnesses had been examined, and consequently Burrey could not exercise the right of cross-examination. "The only evidence called was of a character that did not show anything which would subject him to the finding of the Board" : *Burrey v. Marine Board of Queensland* (4 Q.L.J. 151).

So a prohibition lies if another Court determines by improper evidence ; as, if the Commissioners of Appeals for the Excise determine by minutes of the evidence taken by a justice of the peace and do not examine witnesses *viva voce* : R. 5 Mod. 272 ; Com. Dig. : Proh. F. 13.

A. sued B. for wages in the Petty Sessions Court, and after evidence on both sides, the bench failed to agree, and the papers were marked "No order made." Thereafter A. again sued B. for the same wages before another bench, and some witnesses were sworn and examined, but others merely had their previous depositions read over to them. A prohibition sought upon another ground was refused, but the Court intimated that the above mode of proceeding was quite irregular. the new proceedings should have begun *de novo*, and all the witnesses should have been sworn ; had this point been taken a prohibition would have gone : *Nixon v. Forbes* (S.M.H., 13th July, 1858).

The applicant and another person were supplied with water by the respondent municipality through a common meter. The applicant was sued in the Petty Debts Court for the price of the water. There was no evidence as to how much was supplied to the applicant and how much to the other person. A verdict was given against the applicant. "The magistrate therefore, without any evidence to justify it, made a mere arbitrary deduction . . . . It would be unjust to charge the applicant for the whole of the water where there is evidence that the greater



part of it was supplied to Permewan Wright & Co. The rule will be made absolute with costs": *Ex parte Gale* (24 W.N. 90).

A Small Debts Court gave a verdict for a limited liability company in an action for calls which they had made on fully paid shares. A prohibition was granted. Counsel argued that it was against natural justice because the evidence showed positively that no debt was due: *Ex parte Blaxland* (13 W.N. 185).

"It was admitted that unless under sec. 266 Justices of the Peace Act 1882, the objection to the decision on the ground that the evidence did not justify it could not be supported, the Court having jurisdiction."—*Denniston, J.*, in *Nutt v. Bishop* (13 N.Z.L.R. 656).

"It was further objected that the magistrate had declared another candidate elected, without having evidence that that other person was a candidate. That proof, I think, the magistrate should have required; but, although he may have come to the conclusion that he was a candidate without it, I am not at all certain that on prohibition his decision can be set aside, even though he had no evidence before him that Mr. Dolamore was duly nominated. Certainly, if it was desired to impeach his decision on that ground, it should appear that Mr. Dolamore was not duly nominated. That does not so appear; there is an affidavit that he was nominated": *Simson v. Hunter* (11 N.Z.L.R. 705).

The applicant was charged under Act No. 11 1843, for that being the father of an illegitimate child of the complainant . . . he did desert such child . . . A prohibition was granted by *Gwynne, J.*, on the ground that there was no evidence of desertion of the child, and by *Boothby, J.*, on the ground that as there had been no adjudication of paternity, the magistrate had no jurisdiction to order maintenance by the applicant. *Hanson, C.J.*, dissented—" . . . this was not a case for prohibition. I understand that a prohibition was to go only when an inferior Court had assumed jurisdiction to deal with matters which did not properly come within its jurisdiction at all, or, in dealing with matters within its jurisdiction had taken a wrong view and done something which no evidence applicable to the case would warrant them in doing. If their conduct, though erroneous, did not fall within either of these, the rule of procedure was either by mandamus to compel them to do what they ought or by *certiorari* to bring up the proceedings that they might be quashed upon the defect being made apparent to the Court . . . . It appears to me, the matter being within the jurisdiction of the magistrate, and he having made the order upon evidence, he had not done anything which appropriate evidence would not warrant him in doing. The evidence on the question of desertion would

appear to be to a certain extent inadequate, but it was contrary to law to found a rule for prohibition upon a ground of objection which was not taken at the trial and was not taken in the rule. It appears to me, therefore, that this is not a case for a prohibition, as the matter was clearly within the jurisdiction of the magistrate, and he had made no order but what he would have been warranted in making, supposing appropriate evidence had been given": *Evans v. Thomas* (0 S.A.L.R. 82).

A prohibition was sought against a conviction under the Deserted Wives and Children Act, 1900 No. 35, on the ground that there was no evidence of desertion. *G. B. Simpson, J.*, held that this was a ground for statutory prohibition: *Ex parte Brown*, (4 S.R. 714).

A prohibition was sought on the ground that there was no evidence to support an order made by justices, but was refused on the ground that appeal and not prohibition was the proper remedy: *R. v. Fetherston*; *Ex parte Roberts* (12 V.L.R. 159).

Applicant was convicted under 11 Geo. II. c. 19 for fraudulently removing goods to avoid distress. A prohibition was sought on the ground that upon the evidence and finding of the magistrate the applicant should have been acquitted. *G. B. Simpson, J.*: "This is an application for a prohibition at common law; it is not an application for a prohibition under the Justices Acts. Before the applicant can succeed in an application for a prohibition at common law, he must satisfy this Court that the inferior Court acted without jurisdiction, or acted contrary to natural justice. The first ground on which the rule *nisi* was granted was that upon the evidence and finding of the magistrate the applicant should have been acquitted. That is not a ground upon which a prohibition can be granted at common law": *Ex parte Mumby* (15 W.N. 209).

The County Court Judge held that a plea, to an action for work done, of a deed of conveyance for the benefit of creditors was not made out. Held, that the Judge had jurisdiction to decide as he did, and, however erroneous his decision, no prohibition would lie: *Norris v. Carrington* (16 C.B.N.S. 396).

Foreign attachment being issued against A., he set up that he had no money in his hands belonging to the defendants in the action, but verdict and judgment passed against A. A. now sought a prohibition against the Mayor's Court, on the ground that the money in his hands was trust money for all the creditors of the defendants and that trust money is not within the custom of London. But a prohibition was refused; prohibition could not be granted for a wrong decision on the

merits: *Blacquiere v. Hawkins* (1 Doug. 378). See this case explained by Willes, J., in *Mayor, &c. of London v. Cox* (L.R. 2 E. & I. at 276).

"It seems to me to be very important that we, who are sitting merely as a Court of prohibition, should be most careful not to attempt to draw within our net, as a Court of Appeal, the question whether the use of a stole was an act of the same or a like nature which the Acts expressly prohibited. It was suggested that there was no appeal from the decision of the Judge on this point, but I should not like to say that there was not. I am disposed to think that an appeal would lie, but that is a matter with which we have at present nothing to do. Either there is an appeal or there is not. If there is an appeal, that is the proper remedy. If there is not an appeal, that is a *casus omissus* in the Act of Parliament, and we cannot enlarge our jurisdiction as a Court of prohibition because there is not sufficient and proper machinery to deal with the question by way of appeal where it clearly is, according to my view, a question of appeal, and a question of appeal only—that is, as to whether the conclusion in point of fact has been properly arrived at, and whether the judicial discretion has been properly exercised."—James, L.J.: *Dale's Case*; *Enraght's Case* (6 Q.B.D. at 452).

Applicant, who resided in Sydney, wrote to a newspaper proprietor in Gunnedah to insert a half-inch advertisement in his paper for three months. The proprietor inserted a one-inch advertisement (at the same price as half-inch) for three months, and continued doing so for twelve months more, sending regularly to the applicant copies of the paper. The applicant did not appear to answer a summons in the Small Debts Court at Gunnedah, but wrote that he objected to the jurisdiction. The magistrate came to the conclusion that the contract was made in Gunnedah for three months, and that the continuation of the advertisement was a continuation of the old contract, and not a new contract. Owen, J., said: "Now, whether the magistrate was right or wrong on the question of fact or on the law as applied to those facts, it is not for the Court to consider in any way. The magistrate undoubtedly had jurisdiction in the first instance, which gave him the right to deal with the whole subject matter." A prohibition was, therefore, refused: *Ex parte Fealey* (18 N.S.W.R. 282).

The Industrial Arbitration Court had jurisdiction to make an award between employers and employees in an industry, to make such an award a common rule of the industry, and to inflict penalties for breaches of such common rule. In proceedings for a penalty for a supposed breach, it was alleged that the relation of employer and employee did not exist between the parties. The Arbitration Court, having decided that such

relation did exist, on application for a prohibition it was *held* that the question whether such relation did or did not exist was not a question preliminary to the main enquiry, and so open to review within the rule in *Bunbury v. Fuller* (9 Ex. 111. at p. 140), but a decision on the merits, so that if it was erroneous, it was a mere error of law and not the subject of prohibition: *Amalgamated Society of Carpenters, &c. v. Haberfield Proprietary, Ltd.* (5 C.L.R. 33).

A claim was made for half cost of a dividing fence; objection was taken before the magistrate that the defendants had not been served with notice to fence, as required by the Act. The magistrate overruled the objection, and found for the plaintiff. *Denniston, J.*, *held* that prohibition was not the proper remedy and, on appeal, his view was upheld. *Prendergast, C.J.*: "The plaintiff in the Magistrate's Court had to prove that the facts existed which constituted the debt; the determination whether or not these facts existed was for the magistrate; there was not a collateral fact—no fact beside the merits, the existence of which as a preliminary to the case being within the jurisdiction of the magistrate—for the plaintiff to prove, as was the case in *Elston v. Rose* (L.R. 4 Q.B. 4), consequently the magistrate's decision that the facts existed which made up the debt could be reviewed only on appeal": *Finlay v. Bishop* (1 Gaz. L.R. 13, 59; 17 N.Z.L.R. 184).

A magistrate ordered applicant to pay to one Halliday £135 for improvements in ringbarking (43 Vic. No. 29, sec. 15). A prohibition was sought on the ground that ringbarking was not an improvement for which the holder of a pastoral lease from the Crown is entitled to compensation. But the prohibition was refused—the question whether ringbarking was an improvement was a question for the magistrate to determine: it was not possible to say that under no circumstances could it be not an improvement: *Ex parte Thomas* (2 N.S.W.R. 39).

A magistrate had made a certain order on an appeal against a municipal assessment. "There are a number of grounds stated which all go to the merits and tend to show that the decision of the magistrate was erroneous. But by sec. 175 of the Municipalities Act (31 Vic. No. 12) it is expressly stated that the decision of the magistrates shall be final as regards the matter of such appeal, and supposing that this procedure is one that can be taken, still we cannot enquire into any error of the magistrate as to questions of fact, because this is a matter exclusively within his jurisdiction": *Ex parte McInnes* (4 N.S.W.R. 143).

A prohibition was sought to restrain the defendants from proceeding upon an order made by justices confirming an assessment

made by a municipal council. Sec. 79 of 28 Vic. No. 21 enacts that the decision of the justices "shall be final as regards the matter of appeal." The justices decided that where lands had no residence on them, they were unoccupied within the meaning of 28 Vic. No. 21, and confirmed the assessment, although it was rented to a tenant at a considerably less rent than the sum at which the land was assessed. It was *held* that a prohibition did not lie—before the justices can determine the value at which the property is to be assessed, there is a preliminary inquiry—whether it is occupied or unoccupied (sec. 81) : "It was, therefore, necessary that the justices should decide whether it was occupied or unoccupied and that would be part of the matter of appeal. . . . That being then the matter of appeal, it appears to the Court that the matter was final, and that we have no jurisdiction to give a prohibition against the justices."—*Lilley, J. : Ferrett v. Barlow* (1 Q.L.R. 46).

Application for a prohibition to a Mining Warden's Court. *Pennefather, J.*, examined the facts and concluded that the sole question that arose was a question of the administration of an Act within the warden's jurisdiction, "and if he decides wrongly it is a matter for appeal, not prohibition" : *Howell v. Ross* (16 N.Z.L.R. 684).

A prohibition against the Court of Mines, in respect of an order made within its jurisdiction, was refused. "Whether the decision given was right or wrong it is not the province of this Court to determine. It would be intolerable if we were to interfere by prohibition on every occasion when a slip is made."—*Per Barry, J. : R. v. Cope ; Re Moore v. White* (4 A.J.R. 113).

### 5. *Improper reception and rejection of evidence.*

"But the second ground is the reception of improper and the rejection of proper evidence. Here I must again recur to the answers to the complaints to the Judges. That all common law Courts ought to proceed upon the general rule, namely the best evidence that the nature of the case will admit, I perfectly agree. But that all other Courts are in all cases to adopt all the distinctions that have been established and adopted in Courts of common law is rather a larger proposition than I choose directly to assent to. If, for instance, a witness excommunicated for contumacy were offered, he would not be received in a Court of common law ; it is an established rule and we are bound by it. But I do not hold that to be quite so extensive as that it should go to Courts Martial, naval or military. There are other formal objections that do not affect the credibility of witnesses, but in the present case I do not find the objection to be founded in fact."—*Lord Loughborough in Grant v. Gould* (2 H. Bl. at 104, 105).



But in the case of Courts which proceed according to the rules of common law, the erroneous admission or rejection of evidence is not a ground for prohibition : *In re Dunford* (12 Jur. O.S. 361).

A County Court Judge granted a new trial without any legal evidence to support the motion. "I agree with my brother *Fry* that there was some admissible evidence as to the state of the juryman before he was sworn, on which the County Court Judge could act. But, assuming that no such evidence had been given, I should still say that there could be no prohibition in this case, because neither an erroneous decision as to the admissibility of evidence, nor a decision against the evidence or without any evidence are grounds for a prohibition. I think that *Re Dunford* (12 Jur. 361) is an authority for that proposition."—*Lopes*, L.J., in *Reg. v. Judge of Greenwich County Court* (60 L.T. 248).

Where justices, on the hearing of an application for a certificate, admitted improper evidence, *held* that this was merely a mistake of law and not a ground for prohibition. *Real*, J., said : "There are several cases showing that where justices having jurisdiction made mistakes in exercising their jurisdiction, this Court will not interfere by prohibition, and indeed in one case where justices having power to make an order did so without any evidence at all to support their order, it was held that prohibition was not the proper remedy" : *R. v. Licensing Authority of Roma* (1908 S.R. (Q.) 97 ; 1908 Q.W.N. 27 ; 2 Q.J.P.R. 23).

A prohibition being sought to the County Court on the ground that the Judge allowed a judgment of the Queen's Bench to be proved by an examined copy of the judgment roll, *Parke*, B., said : "A special jurisdiction to try cases of a certain kind is given by statute to the Judges of those County Courts, and although they ought, according to the best of their ability to decide according to the rules of law, still, if they depart from those rules, as for instance by receiving improper evidence, we have no power to control them. It would have been different if the statute had said that the Judge of the County Court should not receive an examined copy of a record as evidence—in that case you might have had a prohibition." In the same case, *Rolfe*, B., explained the prohibitions to the Ecclesiastical Court for requiring more than one witness by saying that they proceeded on grounds not recognised by common law : *In re Dunford* (12 Jur. (O.S.) 361).

"The next question was that the copy of the roll which the magistrate had was imperfect, and that he ought not to have received an imperfect copy of an imperfect roll ; for the roll was imperfect as well as the copy in evidence. If, however, the magistrate has jurisdiction

to enter on an inquiry, the circumstance that he goes wrong in the reception of evidence and admits as evidence what is not strictly legal evidence, or even *refuses to admit what is legal evidence*, is certainly not ground for prohibition. That is decided by the Court of Queen's Bench in the case of *Ex parte Higgins* (10 Jur. 838).—*Per Williams, J.* : *Simson v. Hunter* (11 N.Z.L.R. 705).

“The seventh ground of the appeal is that the Judge improperly rejected evidence. If he did (as to which I give no opinion, the evidence being contradictory) that is no reason for granting a prohibition. The Judge did not give himself jurisdiction by wrongly deciding on a point of law, as in *Elston v. Rose* (L.R. 4 Q.B. 4). He had jurisdiction before the evidence was rejected and therefore he had jurisdiction to give the decision which is alleged to be wrong : *Mau v. Weightman* (3 V.L.R. (L.) 110 ; *Ex parte Rayner*, 17 L.J.C.P. 16). In *Re Dunford* (12 Jur. 361), the improper reception of evidence by the Judge of a County Court was held to be no ground for a prohibition to the Court against its proceeding.”—*Holroyd, J.* : *R. v. Casey* ; *ex rel. City of Fitzroy* (23 V.L.R. 495 ; 19 A.L.T. 145).

Applicant had been summoned in the Small Debts Court for rates under the Metropolitan Water and Sewerage Act, and verdict went against him. Applicant was registered proprietor of the land, but sought to give evidence of a contract of sale to prove that he sold the land to another person and that this purchaser was entitled to the rents and profits (see secs. 2, 88). The magistrate rejected the evidence, and a prohibition was asked on the grounds that he had no jurisdiction as the applicant was not the owner within 43 Vic. No. 32, and that the order was against natural justice by reason of the rejection of the evidence tendered by the applicant. But prohibition was refused. *Stephen, J.* : “What the magistrate did was simply this : he came to the conclusion that it was no use tendering the contract of sale, and he rejected the evidence because he decided that the person who held the certificate was the person in receipt of the rents and profits. He did not refuse to hear the defence, but he rejected the evidence, just as a Judge rejects evidence which he thinks irrelevant. If it was an erroneous decision, we cannot interfere by prohibition, because his mistake was merely a wrong decision in law. . . . The Court of Petty Sessions had jurisdiction over the person and over the subject matter. It is said that the applicant was not the owner under the Act, and the Court had no jurisdiction, but the magistrate held that he was the owner. If he was wrong on that point it was merely a mistake in law, and this Court has no power to interfere with his decision on an application for a prohibition.” *Cohen, J.* : “The second ground is that the order was

against natural justice, by reason of the rejection of the evidence tendered by the applicant. This was not a case of wrongly refusing to hear evidence, which brings it within that class of cases where the refusal to hear evidence is contrary to natural justice. What the magistrate did was to reject evidence which he considered immaterial. That is no ground for a common law prohibition. . . . He was holder of the certificate of title, and *prima facie* liable to pay the rates. That being so, it is impossible to hold that the decision of the magistrate was contrary to natural justice, and that distinguishes this case from *Purcell v. P. T. Co.*, in which an order was made against the defendants, who could not under any circumstances have been liable for the debt " : *Ex parte Alldritt* (15 W.N. 43).

Justices rejected the evidence of a witness who remained in Court after an order that all witnesses should leave the Court. A prohibition was granted ; it made no difference that an affidavit by the justices stated that the evidence which the witness was ready to give would not have affected their decision : *R. v. Guthridge* ; *Ex parte Campbell* (4 V.L.R.C.L. 77).

A prohibition was sought on the ground that " the cross-examination of a witness was improperly stopped." The Court was of opinion that this was contrary to natural justice, and a good ground for granting a prohibition : *Ex parte Moy Shing* (4 S.R. 480). ✓ 707

A defendant in the Court of Petty Sessions was put into the box to prove receipt of a letter from the complainant. Defendant's attorney wished to cross-examine him generally, but the bench refused him leave except in regard to the evidence the witness had then given with reference to the receipt of the letter. An order being made in favour of complainant, a prohibition was granted by *G. B. Simpson, J.* " The magistrates were clearly wrong in refusing to allow Mr. Betts to cross-examine Kane when he was called on behalf of the complainant. The magistrates had no right to limit the cross-examination by confining Mr. Betts to the matter about which Kane had been called as a witness. *Dr. Sly* admits that the magistrates were wrong, but contends that their error is not a ground for granting a prohibition. I am of opinion that it is " : *Ex parte Kane* (9 W.N. 25).

The Marine Board summoned the captain of a vessel to give evidence in an inquiry before it as to the cause of the vessel's wreck. A charge of manslaughter was at the time pending against the captain. *Held*, that the Court had no power to grant a partial prohibition to stop the examination of a witness ; they might grant a prohibition if it was conducted contrary to natural justice or to the principles of

common law. But this was a legitimate and necessary inquiry : *Ex parte Webber* (7 N.S.W.R. 317).

E.'s license as a pilot was suspended by the Court of Marine Inquiry. A prohibition was sought on the ground (*inter alia*) that counsel for the Marine Board called E. as a witness, and, in spite of objection, the Court compelled him to give evidence. This the Court were *held* entitled to do. E. was a competent and compellable witness ; the penalty was not a fine or imprisonment, and he could have refused to answer questions which might incriminate him under other sections of the Act : *In re Emmerson* (23 A.L.T. 10 ; 27 V.L.R. 56).

There had been two separate charges against the applicant in the Police Court ; the evidence on the first case was closed and the magistrate postponed his decision until he heard the evidence on the second charge. After dealing with the second case, the magistrate convicted the applicant upon the first charge. *Pring, J.*, following *Hamilton v. Walker* ([1892] 2 Q.B. 25), *held* that "the magistrate, when he heard the evidence in the first case, ought to have considered it and either convicted or acquitted. . . The magistrate should decide on the evidence in the case and that only." A prohibition was, accordingly, granted : *Ex parte Watts* (23 W.N. 69). Cf. *Reidy v. Herry* (23 V.L.R. 508) ; *Peterson v. Steinacher* (4 A.L.R. 169). But see *Forbes v. Newbold* (24 V.L.R. 176) ; *Williams v. Millett* (25 V.L.R. 513).

Two criminal charges were laid against R., arising out of the same set of circumstances. The magistrate reserved his decision on the first case until he had heard the evidence in the second case. A prohibition was refused. The magistrate made an affidavit that he reserved his decision, not for the purpose of considering the second case in the light of the evidence given in the first case, but to enable him to consider the evidence in each case respectively : *Reg. v. Fry* (67 L.J.Q.B. 712) was followed : *In re Ryan* (22 N.Z.L.R. 187).

#### 6. *Mala fide* prosecutions.

Witnesses in a case had been examined before the Master in Equity. The evidence was not closed ; the case was not heard ; and the witnesses were being criminally prosecuted for perjury in giving their evidence. Upon the facts proved, the Court *held* that the prosecution was not *bona fide* for the purpose of punishing perjury, but was *mala fide* for the purpose of intimidating the witnesses, and was an undue interference with the administration of justice which the Court had general jurisdiction to restrain. An order was made restraining the plaintiff from further proceeding in the matter of the information : *Ex parte Cooper* (1 N.S.W.R. 143).

A person who was under committal for perjury instituted pro-

ceedings for forgery against the chief witness for the prosecution. The Court *held* that the facts showed that the prosecution was not instituted *bona fide* in the interests of justice, but with a view of damaging the testimony the applicant was to give against the respondent at the trial, and that the Court could and would exercise the power to restrain the respondent from proceeding with the prosecution until after his own trial for perjury. A prohibition was granted with costs against the respondent: *Ex parte Green* (9 N.S.W.R. 176).

G. laid an information against B. for perjury in an action before the Supreme Court in which they were respectively plaintiff and defendant. The real question at issue in the action was whether a certain receipt bore the signature of G. He swore that it was not his signature, and B. swore that G. had written it in his presence. The jury found for G. The alleged perjury was in respect of B.'s evidence as to this signature. Before the time for appeal had expired and during the course of the hearing of the criminal trial before the magistrate, B. obtained a rule *nisi* for a new trial in the action in the Supreme Court on the ground of the discovery of fresh evidence. Application was made to the magistrate to stay proceedings in his Court until the disposal of the rule *nisi* for a new trial, but he declined and stated his intention to take all the evidence for the prosecution and then remand the defendant from time to time. Defendant then brought an action against the magistrate and obtained an order for an interim injunction restraining him from proceeding until a certain day, with leave to serve a notice of motion for that day for an injunction or mandamus to restrain him from proceeding until the disposal of the rule *nisi* in the Supreme Court action. It was *held* that there is no precedent for an action by a defendant against a justice for an injunction or mandamus to restrain criminal proceedings. But that under secs. 107 and 108 Justices Act (50 Vic. No. 17) a justice has no authority, after taking evidence on a preliminary enquiry in a criminal case, to remand the defendant pending the result of Supreme Court proceedings, but must either discharge or commit the defendant. Although it is in a justice's discretion to proceed until restrained by the Supreme Court, it is a safe rule for justices not to entertain complaints when civil proceedings are pending in other Courts in respect of the same subject matter: *Reg. v. Ingham* (14 Q.B. 396), approved. The order made was: "Dismiss the action against (the magistrate) and let the plaintiff G. be restrained from further proceeding on the information in *Reg. v. B.* until after the hearing of the rule *nisi* for a new trial in *G. v. B.*, and subject to such further order as the Court may make thereon in respect of such information": *Goldsmith v. Pinnock* (4 Q.L.J. 17).



7. *Actions by and against wrong parties.*

A wife, administratrix, sued in the Small Debts Court in her own name for a debt due to her deceased husband. Applicant filed affidavits showing that he had a set-off. A prohibition was granted. *Martin*, C.J. : " It is clear that an action in an inferior Court by an executor or administrator must be brought by him in his representative capacity." *Faucett*, J. : " There was a clear miscarriage of justice." *Hargrave*, J. (*diss.*) held that there was no want of jurisdiction, or want of natural justice : *Ex parte Brown* (Knox 320).

Where a verdict was given for rates in favour of a " municipal council," a prohibition was granted. The Court had no jurisdiction to give a verdict for rates except in favour of persons mentioned in the Municipalities Act (*i.e.*, a Municipal District) : *Ex parte Egan* (15 W.N. 159). But this decision was dissented from in *Ex parte Crystall* (20 N.S.W.R. 267).

The Small Debts Court gave a verdict for the plaintiff, who sued as " The Municipal Council of Jerilderie," instead of as " The Municipal District of Jerilderie." *Held*, that suing in the wrong name was a mere technical error which the Court could disregard under sec. 42 of 10 Vic. No. 10 ; but even if the magistrate made a mistake in giving a verdict for the plaintiffs, he made a mere mistake in law, and it is not a matter in which this Court can interfere by way of prohibition : *Ex parte Crystall* (20 N.S.W.R. 267).

Plaintiff sued defendant in a Small Debts Court in his own name for that defendant slandered plaintiff's daughter. Verdict for plaintiff for £10. A prohibition was sought on the ground that the plaintiff disclosed no cause of action. *Stephen*, C.J. : " The justices had jurisdiction to try a case of slander, but they had no jurisdiction to authorise the plaintiff to sue for a cause of action which was vested in another person. If A. has slandered B. the justices cannot authorise C. to sue. . . . I am of opinion that the prohibition must go " : *Re Thomas* (Tarl. T.R. 141).

An infant sued in the Small Debts Court for damages for detention of sheep. Sec. 18 of 10 Vic. No. 10 (see now sec. 23 of 1899 No. 13) permits infants to sue in their own names for " wages or any other sum whatsoever not exceeding the sum of £10." A prohibition was granted—the infant could not sue for such damages : *Ex parte Adams* (Knox. 459).

A common law prohibition was sought in respect of an order made under the Infant Protection Act, 1904 No. 27, on the ground that the complainant in the Court below, who was under the age of 21 years,

did not prosecute the suit by her next friend. *Darley*, C.J., said : " It is a mere matter of procedure, and this Court will not grant a prohibition in respect of an error in procedure : see the judgment of *Parke*, B., in *Ex parte Story* (8 Exch. 195). We cannot sit as a Court of Appeal to decide questions of that nature. All we can do is to see that the Court has not acted in a matter which was beyond its jurisdiction " : *Ex parte Townsend* (6 S.R. 260).

Mortgagees sued in a Warden's Court to cancel a lien. On motion for a prohibition, it was objected that mortgagees had no status to bring actions to cancel liens. *Stout*, C.J., held that they had such right : " Further, suppose they had no such right, that is matter of appeal and not a ground for prohibition " : *Drummev v. Kenny* (24 N.Z.L.R. 792).

The assignee of a debt sued the debtor in the Small Debts Court in his own name and obtained a verdict. The Court, on appeal from *Cohen*, J., discharging the rule *nisi*, held that a prohibition should not go. *Darley*, C.J. : " We can only grant a prohibition if the Court had no jurisdiction, or if the verdict was contrary to natural justice. In the first place it appears to me that the Court had jurisdiction, both as to the parties and as to the amount of the claim. It may be that the magistrate made a mistake in allowing the plaintiff to sue, and that he ought properly to have nonsuited him ; but if a mistake in law was made in permitting him to sue, that is not a matter which we can deal with by prohibition. Further, I do not think that the decision can be said to be against natural justice. The cases cited for the applicant are distinguishable. In *Ex parte Moate* it was held that although the justices should, if they had known the law, have decided differently, yet upon the evidence before them it could not be held that their verdict was contrary to natural justice. So here I do not think it is against natural justice that a person who admittedly owes a debt should be ordered to pay it to the person who is now actually entitled to it. It may be that the magistrate made a mistake in allowing the case to proceed when the action was not brought in the names of the proper parties, but since he did not order a nonsuit, I do not think that we can say that his verdict was against natural justice, seeing that the person who in fact owed the money was made to pay it." *Stephen and Simpson*, JJ., concurred : *Ex parte Martin* (17 N.S.W.R. 200).

By sec. 41 of 18 & 19 Vic. c. 63, the County Court has jurisdiction to settle disputes between friendly societies, on the application of persons interested. Held, that it was a condition precedent to the jurisdiction that the applicant should be a person interested : *Hull v. McFarlane* (2 C.B.N.S. 796).

T., a person who had no license to carry for hire beyond the boundaries of a municipality (sec. 4 The Carriers Act 1866), sued in the Small Debts Court to recover money due on a contract to carry for hire. The defendant raised the objection that T. had no license, and could not, therefore, sue, but the justices gave judgment for T. A prohibition was refused—the justices had jurisdiction, but made a mistake in its exercise: *The King v. The Justices at Rockhampton* ([1903] S.R. (Q.) 71).

A Small Debts Court *held* the applicant liable to a municipality for past rates due on a house before he entered into possession of it. A prohibition was refused. *Stephen, C.J.*, said: "This Court of Petty Sessions had jurisdiction over the subject matter, as was decided in *Ex parte Backhouse* (3 S.C.R. 85), and also over the person of the applicant, and, therefore, we cannot interfere by prohibition": *Ex parte Hamilton* (4 S.C.R. 64).

Upon an interpleader summons, a magistrate decided that a claimant under an agreement to hire goods could not support his claim, because his agreement was not registered as a bill of sale. His decision was clearly wrong, yet he had jurisdiction over the person and over the subject matter and merely made a mistake in law. A prohibition was refused: *Hale v. Molloy*; *Ex parte Hamilton* (4 W.N. 126).

A Court of Petty Sessions gave a verdict against husband and wife for a debt contracted by the husband. *Held*, that a prohibition should go. *Darley, C.J.*: "It is quite clear that the order against the wife was entirely against natural justice. There was not a scintilla of evidence from which it could be inferred that the wife was in any way liable for this debt. Anyone in the community might just as well have been joined as a defendant in this case." *Windeyer, J.*, agreed, and *Stephen, J.*, said: "I base my decision on the ground that the order made by the magistrate was against natural justice": *Ex parte Healey* (9 W.N. 180).

A verdict was given in the Small Debts Court against a married woman for bricks, which the evidence showed had been ordered by and delivered to the husband. In opposition to a rule for a prohibition, evidence was tendered that the bricks were used on the wife's separate property. *Darley, C.J.*: "That evidence was not before the magistrate, and the question we have to consider is whether on the evidence before him, his decision was contrary to natural justice." Rule absolute: *Bowtell v. Lindsay* (16 W.N. 107).

A wife had ordered goods and promised to pay for them out of her separate estate, and the goods were delivered to her. A verdict was given by the Small Debts Court against both wife and husband, though

before the Act of 1893. "The evidence before them should, if objected to, have been rejected, and even with this evidence before them they should have nonsuited. This Court, however, is not a Court of Appeal from the Small Debts Court. All we have to see is that they acted within their jurisdiction and that the decision is not opposed to natural justice—however wrong as a matter of law, they had jurisdiction. It was not against natural justice, as the wife ordered the goods and obtained the benefit of them": *Ex parte Moate* (15 N.S.W.R. 83).

A married woman contracted a debt for which her husband was liable, and thereafter obtained a protection order, and later on a decree for judicial separation. In an action against her in the Small Debts Court for the debt, a verdict was given for the plaintiff. A prohibition was granted: *Brown v. Hope* (1 W.N. 4).

The applicant was sued in the Court of Petty Sessions on an order made by J., directing C. to pay the applicant £19 2s. 11d., which order was dishonoured. The applicant was no party to the order, but on the hearing it was proved that the applicant had given this order in payment for goods sold by the plaintiff to the applicant. *Darley, C.J.*, said: "The applicant was sued on an order given by one J., on which the applicant was in no way responsible. He was no party to that order, and it seems to me that he might just as well have been sued for a slander uttered by J. The decision of the justices appears to me to be against natural justice." *Innes and Stephen, JJ.*, concurred: *Ex parte Shakespeare* (15 N.S.W.R. 477).

The plaintiff brought an action in the Court of Petty Sessions against trustees of the estate of a deceased person for money due for work and labour done upon the said estate at the request of the former trustees of the said estate, and had a verdict. A prohibition was granted on the ground that the decision was contrary to natural justice. *Winder, J.*: "On the face of the plaint itself, the plaintiff put himself out of Court. Such a claim showed no liability whatever on the part of the defendants to pay this money, and that being so the magistrate should at once have declined to go into the matter. With reference to the argument that this was a mere error of law, there was no evidence of any kind to support a *prima facie* case against the defendants, and therefore the decision of the magistrate was entirely contrary to natural justice. If it is clear on the face of the proceedings that there is no obligation on the part of the defendants to pay the money which the magistrate has ordered them to pay, then the verdict is against natural justice. This case is very like the case of *Ex parte Healey* (9 W.N. 180)." *Stephen, J.*, concurred, and *Foster, J.*, said: "There is not the slightest pretence that there is any evidence to show that the defendants were liable,

and, therefore, the decision of the magistrate was contrary to natural justice": *Purcell v. The P. T. Co., Ltd.* (15 N.S.W.R. 385).

The respondent proceeded against the applicant under the Masters and Servants Act (20 Vic. No. 28), for wages due to him as servant of an association of which the applicant was a partner, and one of the board of management. The objection was taken that all the partners should have been joined as defendants, but an order was made in favour of the respondent. A prohibition was granted—presumably because one partner cannot be sued alone for a debt due by the partnership: *Ex parte Hitchcock* (11 W.N. 43).

A company was incorporated and had its registered office in Glasgow; it owned and was formed to work a mine in New Zealand. It had no office in that colony, but had an attorney, M., in the colony, appointed by deed. G. did work for the company and sued therefor in a Magistrate's Court, the plaint and summons describing the defendant as "M., attorney for the F. Company, of Auckland." The magistrate amended the proceedings by striking out "M., attorney for," and subsequently judgment was given for the plaintiff. A prohibition was refused; the magistrate had jurisdiction to make the amendment under sec. 80 Resident Magistrates Act 1687. *Bolingbroke v. Townsend* (L.R. 8 C.P. 645) followed: *Guy v. The Ferguson Syndicate, Ltd.* (10 N.Z.L.R. 405).

Objection was taken to the order of a warden assessing the amount of compensation to be paid by applicants for a mineral lease that certain other persons, owners of the land in question, should be parties. The Court *held* that this was no ground for prohibition—"The warden had jurisdiction, and if, for want of evidence, the rights of persons who might be the owners are not properly dealt with, then that is a matter which can be dealt with by appeal."—*Madden, C.J. : The Moe Coal Mining Co. v. Lithgow* (20 V.L.R. 80).

The Industrial Arbitration Court ordered a certain union to be joined as parties in a suit before them, although these persons did not wish to be parties, and said they had no dispute with the employers. A prohibition was sought on the grounds (1) that the Court by ordering the union to be joined, had exceeded its jurisdiction; and, (2) that even if the Court had acted within its jurisdiction, it had acted contrary to the principles of natural justice. The Court, in fact, *held* that the Arbitration Court had acted within its jurisdiction and that the order was not contrary to natural justice: *The Coastal Boilermakers Industrial Union of Workers v. Millar's Karri & Jarrah Co., Ltd.* (7 W.A.L.R. 288).



8. *Bias and interest.*

A prohibition was sought to an elective licensing committee, on the ground that they had sought election on a promise to the electors not to grant any more renewals. The Court *held* that if in any particular instance it is made clear that the inferior tribunal has acted in pursuance of a pledge upon which they have been elected, and not judicially, there are means of compelling them to do their duty : *Isitt v. Taylor* (10 N.Z.L.R. 646).

A. was summoned before a magistrate for detention of goods, and he was ordered to give up the goods on payment to him of £39. The £39 was paid, but A. refused to give up the goods. He was then again summoned, but admitting his liability to pay the value of the goods, refused to give them up, nor was he willing to repay the £39. On this the magistrate said : " I will make an order for the defendant to pay the value of the goods—£48 10s., and fix the costs at £40," and on being asked why the costs were fixed at such an amount, replied : " That's the way I'll meet you." On motion for a prohibition, it was contended that the magistrate had jurisdiction only to allow a " reasonable " sum for costs, and that £40 was unreasonable. *Stawell*, C.J. : " If the magistrate had said nothing when he gave the costs, we might not have felt at liberty to interfere, but we take it that he made the remark attributed to him. . . . It was certainly a monstrous and outrageous thing to do, and we shall make the rule absolute with costs " : *R. v. Panton* (1 A.J.R. 37).

A prohibition was sought on the grounds—(1) that the magistrate had been subpoenaed as a witness, and (2) that in dealing with a previous case he had stated that in future he would send any person convicted of this offence in a no-license district to prison. *Stout*, C.J., said : " . . . In my opinion there is not the slightest ground for any suggestion of bias on Mr. McCarthy's part. All that he has said is that if the case before him is proved he will deal with it in a certain manner. He has been subpoenaed as a witness, and this looks to me like an impudent attempt on the part of the applicant to try to put the magistrate off the bench and select his own magistrate. It is not shown that Mr. McCarthy can give any evidence either for the defence or for the prosecution. It was said that some evidence had been given before him when he issued the search-warrant. If it were held that the issue of a search-warrant by a magistrate on evidence would debar him from thereafter hearing the case, the administration of justice could not be carried on. It is, as I have said, an impudent attempt by Mr. Holland to select his own magistrate. There could be no such thing

as justice administered in the colony if such an application as this were listened to for a moment": *Holland v. McCarthy* (22 N.Z.L.R. 914).

A suit was surmised to be before the Lord President of the Marches for an office between the grantee of the Lord President and a stranger, wherein the only question would be whether the grant of that office belonged to the Lord President? and because in this case he would be, as it were, both judge and party, a prohibition was granted: Bacon's Abridgement, Prohibition (K.).

"The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way, he is disqualified, no matter how small the interest may be. The law, in laying down this strict rule, has regard not so much, perhaps, to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object at all events is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."—*Mellor and Lush, JJ.*, in *Serjeant v. Dale* (2 Q.B.D. 558).

*Per Holt, C.J.*: "The Mayor of Hereford was laid by the heels for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he, by the Charter, was sole Judge of the Court": *Anon.* (1 Salk. 396).

By the common law a Judge who has an interest in the result of a suit is disqualified from acting except in cases of necessity, where no other Judge has jurisdiction: *Serjeant v. Dale* (2 Q.B.D. 558).

Any pecuniary interest in the subject matter of the litigation, however slight, will disqualify a magistrate from taking part in the decision of a case; if a magistrate has such a substantial interest, other than pecuniary, in the result of the hearing as to make it likely that he will have a bias, he is disqualified. A magistrate, who was a surgeon, attended a patient professionally for injury caused by assault. He endeavoured to induce his patient not to prosecute for the assault, and conveyed to him a message sent by the person who had committed the assault, offering an apology and suggesting a settlement. A summons was issued for the assault, the magistrate was subpoenaed as a witness for the prosecution, and a writ of prohibition was obtained to prevent him sitting at the hearing. But a writ of *supersedeas* was issued, and the prohibition was set aside. His acts did not show that he had such a substantial interest in the result as to make it likely that he would have a bias, and the mere fact of his being subpoenaed as a witness did not disqualify him: *R. v. Farrant* (20 Q.B.D. 58).

A bishop who had the patronage of a living, exercised certain judicial functions upon a complaint against the incumbent of the living. The Act 37 & 38 Vic. c. 85, as well as the common law, disqualified the bishop from acting in such a case, and a prohibition was granted against the proceedings of the Court of Arches, whose jurisdiction was invoked by the bishop. His interest disqualified him from discharging the necessary judicial functions precedent to invoking the Court's jurisdiction : *Serjeant v. Dale* (2 Q.B.D. 558),

It is no ground for prohibiting a cause before the chancellor of a diocese in the Consistorial Court of the diocese that the bishop of the diocese is interested in the cause : *Ex parte Medwin* (1 E. & B. 609).

A notice of appeal from a race club to the West Australian Turf Club, was drafted, typed and lodged for the appellant by a clerk to a solicitor. The solicitor was a member of the Turf Club, and sat on the appeal, but did not vote. The solicitor was unaware of the action of his clerk, and no cost book entries were made against the appellant. *Held*, that the act of the clerk constituted the relationship of solicitor and client between the appellant and the solicitor, and that the decision of the committee of the Turf Club was void by reason of interest in the solicitor : *Thomas v. Hayward* (9 W.A.L.R. 212).

The fact that a Judge of the Native Appellate Court, while a Registrar of the Native Land Court, some months previously, had been actively engaged in endeavouring to purchase for the Government a portion of a block of Native land, the subject matter of the proceedings, *held* not to constitute bias : *In re Te Akau Block* (27 N.Z.L.R. 1).

By the Public Worship Act 1874 (37 & 38 Vic. c. 85) if a complaint is made against the incumbent of a living to his bishop, the latter exercises certain judicial functions, and, in certain events, sends the matter for trial by the Court of Arches. A complaint was made against D. to his bishop, who in fact had the patronage of D.'s living, and was therefore disqualified by the Act from acting in the matter. But the bishop invoked the jurisdiction of the Court, which passed sentence on D., who did not know that the patronage of the living had been, before the complaint, transferred to the bishop. D. had notice of the hearing, but did not attend, and, sentence passing against him, he now applied for a prohibition. "The applicant stands upon his legal right, and calls upon us to give effect to it, and we feel constrained to hold that the initiatory proceedings which are made essential to give jurisdiction to the Court of Arches, were, by reason of the bishop being patron of the benefice, contrary to the statute and void,

and that the Court had not jurisdiction to enter upon the inquiry": *Serjeant v. Dale* (2 Q.B.D. 558).

A District Court Judge, being a shareholder in plaintiff bank, heard and decided the case. The application for a rule was made immediately it was known that the Judge was a shareholder. The Judge's decision was against the bank: no objection was taken while the case was proceeding, yet a prohibition was granted "quite apart from sec. 58 of the District Court Act altogether." *Stephen, C.J.*: "I do not put this case on the ground of any supposed bias: but on the ground that such a proceeding is contrary to just principles." *Wise, J.* cited *Dimes v. Proprietors of the Grand Junction Canal* (3 H.L.C. 794), in which a judgment of the Lord Chancellor *Cottenham* was set aside because he was a shareholder in the company: *The Commercial Banking Co. v. Bulgarnie* (3 S.C.R. 27).

A prohibition was granted to the Marine Board on the ground that one of the members of the Board was a shareholder in one of the vessels, the management of which was to be inquired into by the Court. "The course of natural justice might have been interfered with."—*Martin, C.J.*: *Ex parte Dalton* (14 S.C.R. 277).

The fact of a coroner being a shareholder in an insurance company is no ground for impeaching an inquisition in which the coroner found that certain premises were burnt with intent to defraud the insurance company (Coroners Act 1867): *Reg. v. Hocken* (1 J.R.N.S. (N.Z.) 121).

A J.P. was the holder of a spirit merchant's license. He was one of the bench who convicted applicant of selling liquor without holding a license. A prohibition was granted. *Cohen, J.*, referred to *Queen v. Yarmouth JJ.* (8 Q.B.D. 525), where it was held that the chairman of a Court was disqualified from acting as a justice because he was himself a litigant in a matter similar to other matters before the Court. The same case shows it does not matter whether the decision was right or wrong. *Queen v. Huggins* ([1895] 1 Q.B. 563), where a qualified pilot (though his duties did not bring him in conflict with unqualified pilots) was by reason of his interest disqualified from sitting as a justice in a case in which proceedings were taken against an unqualified pilot under sec. 361 of the Merchant Shipping Act 1854—though the qualified pilot was one only of a bench of six, the proceedings were quashed: *Ex parte In Chun* (14 W.N. 12).

A complaint made by an inspector of nuisances for hindering him in his duties was heard by two justices who were both aldermen of the municipality of which the inspector was an employee. A fine was imposed, part of which went to the corporation. A prohibition was granted—the justices were disqualified from sitting in the case: *Ex*

*parte O'Connor* (8 S.C.R. 142). But see Justices Act, 1902 No. 27, sec. 19.

An auditor and a ratepayer of a Divisional Board adjudicated upon a complaint by the Board for the recovery of rates. It was *held* that both were disqualified by interest, and a prohibition was granted: *Raven v. Cleveland Divisional Board* (6 Q.L.J. 67).

A member of a local board of health sat as a justice to adjudicate upon a proceeding to enforce an order of such board. A prohibition was granted: *R. v. Lloyd*; *Ex parte Godfrey* (1 V.L.R.C.L. 120, 300).

A justice, employed as a municipal valuator, and who looked to the council for payment, is not disqualified from interest from adjudicating upon an information laid on behalf of the municipal council. *Owen, J.*: "He was apparently selected as valuator because he had absolutely no connection with the council": *Ex parte Blackey* (18 W.N. 166, 230).

Applicant was convicted before justices under sec. 511 Local Government Act, 1874 No. 506. A prohibition was sought on the ground, *inter alia*, that two of the adjudicating justices were interested as being members of the shire council, which was the real complainant. The Full Court refused to grant a prohibition: "The objection . . . cannot be taken otherwise than by *certiorari*. A prohibition would imply that no justices could hear the case, which is not so here": *Ex parte Scott*; *Re Strutt* (2 V.L.R.C.L. 70). [Cf. No. 1893, sec. 712.]

A party can waive the objection of interest in the Judge: *Serjeant v. Dale* (2 Q.B.D. 558).

[See also cases decided on orders to review collected in Part II.]

#### 9. *Valid plea disallowed.*

"There are exceptions which from their very nature must be first raised in the Court below. These occur in cases where there is jurisdiction over the subject matter, and in which, therefore, prohibition will not go for mere irregularity in the proceedings, or even a wrong decision of the merits: *Blaquiere v. Hawkins* (Doug. 378), but in which it will be granted for a denial or perversion of right, such, for instance, as refusal of a copy of the libel, in which case the prohibition is only *quousque*; or refusal of a valid plea to a subject matter of complaint within the jurisdiction, in which case, although if the plea had been received, it might have been tried in the Court below, yet, if it be refused, then, upon its validity and truth being established in the Court above, the prohibition is absolute: *White v. Steele* (12 C.B.N.S. 383). In these cases there is entire jurisdiction over the subject matter."—*Willes, J.*, in *Mayor of London v. Cox* (L.R. 2 E. & I. at 276).



By consent a decree was made in the Matrimonial causes jurisdiction of the Supreme Court of New South Wales for judicial separation. No order was made or asked for with regard to the maintenance of a child with which the wife was then pregnant. After the birth of the child, an order was made by a magistrate under the Deserted Wives and Children Act 1901, for maintenance of the child. *Held* (1) that the magistrate had no power to make an order the effect of which was to vary an order of the Supreme Court which the Supreme Court had itself statutory power to vary; (2) that the magistrate had wrongfully rejected a plea of *res judicata* setting up the decree of the Supreme Court; (3) that on either ground the applicant was entitled to a prohibition: *Brown v. Brown* (3 C.L.R. 373; 13 A.L.R. 389).

The magistrate had made an order in favour of the complainant under the Infants' Protection Act, 1904 No. 27. A prohibition was sought on the ground that the matter was *res judicata*. An objection was upheld that inasmuch as the magistrate had decided that the matter was not *res judicata* that decision could not be attacked on a motion for a common law prohibition: *Ex parte Stark* (5 S.R. 458).

A man may justify accusing another of having had a bastard if an order of affiliation has been made upon him; and if the spiritual Court refuse the justification, a prohibition shall go: Cro. Jac. 535, 625; 2 Roll. Rep. 61, 82; 2 Inst. 492; 2 Bulst. 296; 1 Freem. 283; Ld. Raym. 394.

A. was charged before justices with an offence punishable summarily. His solicitor set up that A. was then and at the time of the offence insane. The justices refused to hear any evidence except as to A.'s mental state at the time of the offence and convicted. A prohibition was refused—the justices had jurisdiction and the question of insanity was one of fact for them to decide: *Ex parte Borrowes* (2 N.Z.J.R.N.S. 155).

The Judge of the County Court, notwithstanding an admission by the plaintiff that a plea of judgment recovered was true, gave judgment for the plaintiff. *Held*, that this was a mere error of law which the Judge had jurisdiction to make. *Coltman, J.*: "The cases in the spiritual Courts are not by any means parallel to this. The Judges there do not act according to the common law." *Williams, J.*: "I am not sure, upon the statement before us, that the Judge has made a mistake": *Ex parte Rayner* (17 L.J.C.P. 16).

A., purporting to seize goods of B. and C. under a bill of sale, seized also goods of theirs not included in the bill of sale, and also goods of D. B., C., and D. sued for the seizure before a magistrate and obtained a verdict for £100. D. sued separately for seizure of his

goods and obtained £25; and B., C., and D. sued in another action in the same Court for goods not comprised in their first action and had a verdict for £33. The defendant applied for a prohibition on the ground that the demands had been split. *Prendergast*, C.J., said: "So far as I can see, the cases show that if the defendant fails to make his objection on the first trial it is too late to make it afterwards. If in a superior Court there could be separate actions, and after the first trial in the inferior Court there remained something unrecovered, it would be too late to make objection in the second action. This is not disputed with regard to cases arising out of contracts, but it is argued that a different rule prevails in torts. It is said that in trespass there is only one cause of action, and if the plaintiff recovers once, there is nothing left for him to sue upon. This may be so, but that is only estoppel. It seems to me, and I know of no authority to the contrary, that when there is conversion of several articles, each conversion gives a separate right of action, although the owner has a right to bring one action for the whole. If the plaintiff recovers in respect of six out of eight articles, he still has a right of action for the remainder. Even, however, if we assume that he has no cause of action, the remedy would not be prohibition, but appeal." *Williams*, J., said: "If . . . a judgment in the first action could be pleaded in bar of the second, that shows the proper remedy is not prohibition." "The magistrate may have been wrong to give damages, but that again was matter for appeal and not prohibition": *Barker v. Marks* (6 N.Z.L.R. 221, 529).

After judgment against defendant in the County Court, he petitioned for and obtained his discharge under the Insolvent Act, and inserted the debt in the schedule. Upon judgment summons in the County Court (9 & 10 Vic. c. 95, sec. 60) he pleaded his discharge, but the Judge nevertheless made an order for payment by instalments, and, afterwards, on default, for his committal to prison. A prohibition was refused; though the defendant might be entitled to be discharged from prison (as in fact he had been by the order of a Judge), still the order was at most an error in the exercise of jurisdiction, and not an excess thereof, and prohibition did not lie: *Still v. Booth* (1 L.M. & P. 440). Cf. *Ex parte Cripps* (4 W.N. 68).

On moving for a prohibition to the spiritual Court for refusing a plea, the party ought to offer an affidavit of the truth of the facts in the plea: *Burdett v. Newell* (2 Ld. Ray. 1211).

Where a plea of general pardon was refused in the spiritual Court, the plea being invalid, the Court refused a prohibition: *Welcome v. Lake* (1 Sid. 281; 2 Keb. 6, 221).

10. *Miscellaneous.*

Applicant had a case in a Small Debts Court; the justices held he had not proved it, but refused to grant him a nonsuit (holding they had no power) and gave a verdict for defendant. Upon application for a common law prohibition on the ground that the decision was contrary to natural justice, the Court said: "This being an application for a common law prohibition, we have to be satisfied that the Court of Petty Sessions acted without jurisdiction. That Court clearly had jurisdiction over the person and over the subject matter. I am of opinion that the justices ought to have nonsuited the plaintiff, but, nevertheless, on an application for a prohibition we cannot compel them to nonsuit the plaintiff, nor can we set aside the verdict, and that is really what the plaintiff is asking us to do in this case": *Ex parte Wallwork* (20 N.S.W.R. 278).

A County Court Judge nonsuited a plaintiff against the latter's will, being of opinion that sec. 78 County Courts Statute, 1869 No. 345, gave power to do so. The plaintiff now sought a rule *nisi* to prohibit execution for costs from issuing. A rule *nisi* was refused. The Judge had power to nonsuit, but exercised it wrongly. He had jurisdiction to give a wrong decision and prohibition was not the proper remedy: *Mau v. Weightman* (3 V.L.R.C.L. 110). [See No. 1078, sec. 96.]

The fact that a Compensation Court has awarded damages for resumption on a wrong principle is not ground for prohibition: *Chabot v. Lord Morpeth* (15 Q.B. 446).

Three summonses were issued against three defendants for assisting in managing a lottery. The summonses were heard together, and the defendants were convicted. The name of the prosecutor was not disclosed in the summonses, and the Crown Solicitor declined to give it at the hearing when asked. On application for a prohibition it was held (1) that it was not necessary to show any beneficial interest in anyone in the lottery; (2) that the defendants were properly tried together. On the point as to whether the prosecutor's name should have been disclosed, counsel for the respondent urged that "it was unnecessary that the defendants should know, as they were convicted and so there could be no question of costs against the prosecutor. The error or mistake for which sec. 136 of the Act No. 267 gives this remedy by prohibition must be in the substance of the case and not in a mere preliminary matter, which would rather be ground for *certiorari*." The Court differed in opinion. *Fellows and Stephen, JJ.*, held that a person accused has a right to know who is his accuser, and that this is only in accordance with the first principles of justice, and they

accordingly granted a prohibition. *Stawell*, C.J., while regretting that the magistrates did not insist upon the name being disclosed and agreeing that it is only in accordance with the principles of common justice that a defendant should know the name of his accuser, added : “ It is another question whether this Court can interfere. The omission is not, in my opinion, a mistake or error on the part of the justices for which this Court can interfere by prohibition ” : *R. v. Sturt* ; *Ex parte Ah Tack* (2 V.L.R.C.L. 103).

An application was made for a prohibition to restrain further proceedings upon a summons under sec. 4, Infants’ Protection Act, 1904 No. 27, upon the ground that the corroborative evidence as to paternity required by that section had been taken orally, and was not reduced to writing and signed as a deposition by the witness, and that in the absence of such deposition it would be contrary to natural justice to allow the summons to be heard. It was *held* that it is not necessary under the Act that such evidence should be reduced to writing and sworn as a deposition : *Ex parte Anderson* (5 S.R. 448).

## CHAPTER IV.

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**TO RESTRAIN SPIRITUAL COURTS  
FROM HOLDING TRIAL IN A  
MANNER CONTRARY TO THE LAW  
OF THE LAND.**

Where, in order to determine a matter of Ecclesiastical cognisance, a spiritual Court has incidentally to determine a matter of temporal cognisance, prohibition lies if the Court determines such temporal matter in a manner that the law of the land does not warrant.

“As to the third cause (*i.e.*, for proceeding as the law of the land does not warrant) for which prohibitions are grantable, the rule is that where the Ecclesiastical Court proceeds in a matter merely spiritual, if they proceed in their own manner, though that is different from the common law, no prohibition lies; as in probate of wills, if they refuse one witness; but if they have cognisance of the original matter, and an incident happen which is of temporal cognisance, or triable at common law, they must try it as the common law would; as in a suit for a legacy if the defendant plead a release or payment, they must admit the evidence of one witness, but if they admit the proof they are to judge whether he be credible or not; therefore, if they determine against his evidence, the party has no remedy but by appeal”: Buller's N.P., 219 (b), (c).

Cf. also Chapter V., p. 252.

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A prohibition lies to the spiritual Court after sentence and although the libel be for a matter within their jurisdiction, if a temporal matter



become incidental and they refuse such proof as the temporal Courts allow—as if they refuse proof of payment of a legacy by a single witness : *Shotter v. Friend* (3 Mod. 283).

A prohibition being sought to a Court Martial on the ground that evidence was received against the applicant contrary to the rules of the common law, and evidence for him which was admissible was rejected, *Lord Loughborough* said : “ With respect to the matter of evidence, where the inferior Courts proceed upon the admission of evidence that could not be admitted in a Court of law, or upon the rejection of evidence that would be admitted in a Court of law, the 12th Article of the Complaint made against the Judges in the reign of James I. (2 Inst. 608, *Articuli Cleri*) and the answer to that complaint, show distinctly the law upon that subject. The 12th Article of Complaint is that the Courts have granted prohibition to the Ecclesiastical Court upon the ground that the Ecclesiastical Court would not allow the testimony of a single witness to be sufficient in cases where in the common law Courts the testimony of one witness would be sufficient, and their interference is the subject of complaint. The answer the Judges make to it is that in matters subject to the exclusive jurisdiction of the Ecclesiastical Courts, as the setting out of tithes, proofs of a legacy, proofs of a marriage, the Courts do not prohibit, though the rule of the Ecclesiastical Court requires more evidence than the common law to establish the fact ; but that where incidentally a matter comes before them, there the Courts of Westminster Hall, upon such surmise, will grant a prohibition ” : *Grant v. Gould* (2 H. Bl. 101).

The spiritual Court, though they may try matters cognisable at common law which fall in incidentally where the principal is ecclesiastical ; yet they shall be prohibited if they proceed on the trial of such incidental temporal matter otherwise than the common law would : *Juxon v. Byron* (2 Lev. 64).

Although formerly prohibition lay to the spiritual Court where they refused to allow proof of a deed, &c., because there is only one witness, nevertheless from the time of Justice *Jones* till now, no prohibition has been granted in such a case.”—*Per Twisden, J.* : *Prince v. Huett* (1 Sid. 161).

A prohibition does not lie to the spiritual Court for proceeding contrary to the canon law. Even if such law required the bishop to act in a particular case with some assistance, his acting without assistance would be matter of appeal to the delegates, but not for prohibition : *Bishop of St. David's v. Lucy* (1 Ld. Ray. 447, 539).

## CHAPTER V.

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## MISCONSTRUCTION OF STATUTE LAW.

If a spiritual Court construes a statute erroneously, its decision will be corrected on prohibition ; but this rule has no application to inferior Courts of temporal jurisdiction which proceed upon the same rules as do the superior Courts of common law.

But where the question of jurisdiction depends upon the construction of a statute, misconstruction of such statute in this respect is a ground for prohibition.

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“ The construction of Acts of Parliament is of temporal cognisance ; so that, if the *spiritual* Courts expound them in a different sense than they ought to do, a prohibition lies ; as, if upon the statute 32 H. 8 Ch. 38, which only prohibits marriages within the Levitical degrees, the Ecclesiastical Courts should molest or call in question marriages without those degrees, a prohibition lies ; because they act contrary to that which is declared to be lawful by the statutes of the realm. But, where they are not bounded by any law, their jurisdiction still continues, and therefore within the Levitical degrees they are still judges of incest.”  
—Bacon’s Abridgement, Prohibition (L. 4).

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[“ The misinterpretation of a statute by an inferior Court, the consideration of which ariseth incidentally in the course of a proceeding, which is confessed to be within its jurisdiction, should seem to be rather a matter of appeal than a ground for prohibition. But clearly in such a case a prohibition will not lie, unless

it be made appear to the superior Court that the party applying for the prohibition has, in the course of the proceedings in the inferior Court, alleged the grounds for a contrary interpretation of the statute on which he applies for a prohibition and that the inferior Court has proceeded notwithstanding such allegation. As no right is vested by any of the prize Acts in the captors of an enemy's ship and cargo in war, before the ultimate adjudication of the Courts of Prize ; it follows that the issuing of a monition to the prize agents by the Court of Commissioners of Appeals in prize causes to bring in the proceeds of a ship and cargo which have been sold, after a sentence of condemnation as lawful prize, but from which sentence there is an appeal (on a subject distinct from the question whether prize or not, which is not disputed) cannot be a ground for prohibition to that Court, for the monition neither interferes with nor defeats any vested rights."—Bacon's Abridgement, Prohibition (K.).

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"Spiritual Court may proceed upon an Act of Parliament or other temporal matter incident, so long as they proceed according to the rules of the common law : 2 Lev. 64 ; Trin. 24, Car. 2, *Juxon v. Biron*."—Viner's Abridgement, Prohibition D. 11.

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"Always when an Act of Parliament commands or prohibits any Court, be it temporal or spiritual, to do anything temporal or spiritual, if the statute be not obeyed a prohibition lies : 13 Rep. 42 ; Trin. 7 Jac."—Viner's Abridgement, Prohibition (B., a. 6).

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"The prohibition was prayed upon a ground which has never been disputed, that it belongs to the Courts of common law to control the proceedings of all other Courts

if they transgress the limits assigned to them; and the argument for the demurrer has fully admitted the proposition upon which the declaration is built to be good law, namely, that the exposition of the statute law of the land appertains to the King's Courts of Record, and ought to be discussed and determined in those Courts. The general grounds upon which the Courts of Westminster Hall proceeded in matters of prohibition were so fully discussed in a late case (*Brymer v. Atkins*, 1 H. Bl. 165) and when the Court in that case disposed of the motion, that I avoid entering into them, and assume it to be a clear ground for overruling the demurrer in this case, if it shall appear on the face of the declaration that the plaintiff has a legal right founded on an Act of Parliament and that the commissioners of prize are proceeding to deprive him of that right or to obstruct him in the prosecution of it. On the other hand, if the plaintiff has either no such right, or the commissioners of appeals are not proceeding to act in opposition to it, the demurrer must be allowed. It was admitted on both sides, and is certainly true, that the general question of prize does not belong to the Courts of common law. By general questions of prize, I mean a question whether a ship or goods taken at sea be lawful prize or not. It was admitted also that where there is an adjudication of prize by the Court of Admiralty, the rights which an Act of Parliament gives respecting that prize are the subject of actions at law and are cognisable in the Courts of common law."—*Lord Loughborough*, in *Home v. Camden* (1 H. Bl., at 515).

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“On the other hand, it must be admitted that the misinterpretation of either the common or statute law, in a proceeding confessedly within the jurisdiction of those Courts and where they are bound to exercise their judgment upon the one or the other, seems to be rather a matter of

error to be redressed in the course of the appeal which the law has provided, than a ground for a prohibition. The answer to this is that the King's temporal Courts, and your Lordships in the last instance, are, by the Constitution of this country, to declare the common and expound the statute law, and that the possibility of two different rules prevailing upon the same law, one in the King's temporal Courts and the other in Courts of peculiar jurisdiction, ought not to exist, and is effectually prevented without any unreasonable interference, or breaking in upon the Courts of peculiar jurisdiction, by the temporal Courts issuing their prohibition in every such case. But this is no more than saying 'proceed to the very extent of your jurisdiction without interruption from us, only remembering that you are always to declare the common law as we declare it, and that when any question arises touching the exposition of the statute law, if the subject is originally of temporal jurisdiction and comes incidentally before you, it is to be expounded by you as we expound it; or if the statute concerns your proceedings only, you are to expound it as we shall say it ought to be expounded, when the question is brought before us in prohibition.' I understand the claim of the temporal Courts, as it is stated in the famous controversy in the reign of James I. (2 Inst. 601, 602, Art. Cleri.; 4 Inst. 99, 100) is to issue prohibitions to this extent; and though some of the cases in our books have been ably distinguished at the bar and made reducible to the head of excess of jurisdiction, yet we find cases of continual claim to issue prohibitions in the instances above mentioned. In the case of *Brymer v. Atkins* (1 H. Bl. 164) in the Court of Common Pleas, it is stated broadly and distinctly asserted; and in *Full v. Hutchins* (Cowp. 422), *Lord Mansfield*, in delivering the opinion of the Court, plainly alluded to it in the following passage:—'Where matters which are triable at common law arise incidentally in a cause, and the Ecclesiastical Court has jurisdiction in



the principal point, this Court will not grant a prohibition *to stay trial*. For instance, if the construction of an Act of Parliament comes in question, or a release be pleaded, they shall not be prohibited, unless the Court proceed to *try* contrary to the principles and course of the common law, as if they refuse one witness, &c. ; and this is expressly laid down by *Lord Hale*, 2 Lev. 64, *Sir W. Juxon v. Lord Byron*. But it must be remembered that in the argument of this very case in the Court of King's Bench, this doctrine was questioned by one of the learned Judges of that Court (*Buller, J.*, in 4 T.R. 397), upon the general principle that the misinterpretation of an Act of Parliament would be the subject of appeal and not of prohibition, upon the authority likewise of a passage in Chief Justice *Vaughan's* argument in one of the cases reported by him, distinguishing between statutes directory to the Ecclesiastical Court and other statutes, and upon other grounds, which will be very fit to be considered when it shall become necessary to the determination of a case in judgment before a temporal Court in prohibition to lay down the precise rule upon it. It is not necessary to do so in the present case, since we all agree that the statute in question has not been misconstrued by the Prize Court."—*Eyre, C.J.* (delivering opinion of Judges to House of Lords), in *Home v. Camden* (2 H. Bl. at 536, 537).

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“ This brings us to the next point, whether the statutes of the 31 & 37 Geo. III. have been, in the present instance, misconstrued, and, if misconstrued, then that question which is the subject of the second objection arises, namely, whether such misconstruction be a ground for prohibition or merely of appeal ? . . . The last question, therefore, which is certainly a considerable one, alone remains to be discussed. If this were a question which came now for the first time to be considered, we might incline perhaps

to think it should be deemed matter of appeal rather than of prohibition. . . . But, considering the current of authorities from the earliest times . . . we cannot feel ourselves warranted in holding that the grounds of granting prohibitions are so narrow and limited as to be confined solely to cases of excess of jurisdiction . . . ”: *Lord Ellenborough*, in *Gould v. Gapper* (5 East pp. 364, 365).

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“ And the distinctions attempted in argument for the defendant fail in showing that the question now under consideration does not fall within the authority of those determinations in which prohibitions have been granted ; for the cases cited show that prohibitions have been granted in questions within the jurisdiction of such inferior Courts, not merely where the rules of the two jurisdictions necessarily clash with each other, or in cases of construction of statutes regulating their jurisdictions ; but that the Courts of common law have in all cases, in which matter of a temporal nature has incidentally arisen, granted prohibitions to Courts acting by the rules of the civil law, where such Courts have decided on such temporal matters in a manner different from that in which the Courts of common law would decide the same. . . . ”: *Lord Ellenborough*, in *Gould v. Gapper* (5 East, p. 371).

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“ It will not, I apprehend, be contended that the Ecclesiastical Court has not jurisdiction to construe statutes incidentally coming in question before them ; but only that if it construe them wrongly a prohibition shall go. The resolution of the Judges in the reign of Jac. I. does not go further than this.” And see at p. 364—  
“ In such cases (*i.e.*, for misconstruction of a statute) no prohibition can go before sentence ; for till sentence be given, the Courts of Common Law have no reason to

suppose that the Ecclesiastical Court will determine wrong.”—*Lord Ellenborough*, in *Gould v. Gapper* (5 East at 350).

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A prohibition being sought on the ground that an Ecclesiastical Court had misconstrued an Act of Parliament *Patteson, J.*, said: “I am not satisfied of our authority to prohibit in such a case, and do not understand the decision in *Gare v. Gapper* (3 East 472) and *Gould v. Gapper* (5 East 345); but it is unnecessary to discuss that now”: *Blunt v. Harwood* (8 A. & E. at 619; 3 N. & P. 577).

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“With respect to the case of *Gould v. Gapper* (5 East 345), on a former occasion (*Blunt v. Harwood*, 8 A. & E. 619) I expressed an opinion upon it which I then fully entertained. I have since reconsidered that case. It is a very difficult one; but I think I now understand it. I now concur in the decision; and even if the matter were *res integra*, I should adopt the views contained in it.”—*Patteson, J.*, in *Burder v. Veley* (12 A. & E. at 264).

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“We are convinced that the case (*i.e.*, *Gare v. Gapper*, 3 East 472; *Gould v. Gapper*, 5 East 345) not only rests on authority which we could hardly be warranted in disturbing, but is founded in good reason; indeed, that it flows from the principle of prohibition, which *Blackstone* (Vol. III., p. 112, 113) states to be the danger of a different decision of the same rights and even of the same identical interests by different Courts; ‘an impropriety,’ he observes, ‘which no wise government can, or ought to endure and which is therefore a ground of prohibition.’”—*Denman, C.J.*, in *Burder v. Veley* (12 A. & E. at 259).

“It is singular that, in the work which bears his (*Buller*, J.’s) name and which, whether his composition or not, has been always regarded as a valuable depository of general principles of law, it is laid down that prohibition is granted *pro defectu jurisdictionis*, *pro defectu triationis*, or for proceeding as the law of the land does not warrant (*B.N.P.* 218), the precise ground upon which this Court in *Gould v. Gapper* (5 East 365) disagreed with the learned Judge’s sentiments as expressed in *Lord Camden v. Home* (4 T.R. 397).”—*Denman*, C.J., in *Burder v. Veley* (12 A. & E. at 261).

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“The question then remains, what are the defects that authorise and require us to issue the writ of prohibition? The answer is, that they are in every case of such a nature as to show a want of jurisdiction to decide the case brought before them: *Gardner v. Booth* (2 Salk. 548). In whatever stage that fact is made manifest to us, either by the Crown or by any one of its subjects, we are bound to interpose. The misconstruction of an Act is one of these defects; the enforcement of a tax imposed without lawful authority is assuredly another; . . . .”—*Denman*, C.J., in *Burder v. Veley* (12 A. & E. at 263).

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“The first and largest class of cases in which prohibitions have been granted by the Queen’s Courts at Westminster is where a plain and manifest excess of jurisdiction has appeared to have been claimed or exercised by the Ecclesiastical Court; and it is under this head of exception that the present case will be found, if not directly, yet by necessary implication, to range itself. The others are founded on the general principle that, notwithstanding the subject matter is of Ecclesiastical cognisance, the party would receive some wrong or injury by the course of proceeding in the Ecclesiastical Court, or be deprived of some

benefit or advantage to which the common or statute law would have entitled him. *One* class of those cases is where such Court is proceeding to try a matter which is triable only by the common law; as a custom, prescription, or *modus*. *Another*, where, in a case of spiritual cognisance, a collateral question arises which is not properly of spiritual cognisance; in which case the Courts of Common Law oblige them to admit such evidence as the common law would allow: *Breedon v. Gill* (1 *Ld. Ray.* 219, 222); as when, for example, a lease is offered to be proved in an Ecclesiastical Court, and is rejected because by their law two witnesses are required; or, for the same reason, where the fact in dispute is the payment of a legacy. *Another*, where the spiritual Court takes upon itself the construction of statute law, and decides contrary to the construction which is put upon the statute by the temporal Courts. And, *lastly*, another class of exceptions . . . namely, that the spiritual Courts being always bound to declare the common law when it becomes necessary to declare it, in the same manner as the common law Courts would do . . . in such a case, in order to prevent the conflict which would arise from a decision taking place one way in the spiritual Court and the opposite way in the Courts of common law, the prohibition is allowed to go. . . ”—*Tindal*, C.J., in *Veley v. Burder* (12 *A. & E.* at 311, 312).

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“ It is suggested that if the Ecclesiastical Courts have misconstrued the Acts of Parliament, that misconstruction is the matter of appeal. . . But it by no means follows that because the misconstruction of an Act of Parliament by the Ecclesiastical Court may be corrected on appeal, it is not also a ground for prohibition, for, as was observed in *Burder v. Veley* (12 *Ad. & E.* 259), the error may be repeated in a Court of superior jurisdiction, and the proceedings may there go to final judgment, and being regular



on the face of them, the power to prohibit may be lost": *White v. Steele* (12 C.B.N.S. 383).

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" . . . I do not mean to express any opinion whatever on the question as to the limits between what would be properly matter for prohibition and what would be matter of appeal only. It is a very difficult question; any one who reads the case of *Gould v. Gapper* (5 East 345), the doubt expressed by Justice *Patteson* in *Blunt v. Harwood* (8 Ad. & El. at 619), as to whether that case was rightly decided, and his subsequent recantation of that doubt in *Burder v. Veley* (12 Ad. & El. 264), will see how difficult."—*Lord Blackburn*, in *Mackonochie v. Lord Penzance* (L.R. 6 A.C. 445).

Cf. also Chapter IV., p. 250.

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As to misconstruction of statute on which jurisdiction depends, see Part I., Chapter I., p. 177 *et seq.*

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### *Illustrations.*

In order to constitute a good assembly of a select vestry (56 Geo. III. c. 45, and 56 Geo. III. c. 30), a majority of those named in the appointment must be present. A rate for the repair of a church was made when no majority was present, and A. was sued in a spiritual Court for such rate. He obtained a prohibition—the rate so imposed was illegal. The apparent ground for the prohibition was that the statutes were misconstrued: *Blacket v. Blizard* (9 B. & C. 851).

S., who claimed to have purchased shares in a block of land, appeared before the Native Land Court on the hearing of an application by native owners of the block for a partition. S. had given notice of intention to apply for a partition, but the time for hearing his application had not then arrived. S. was allowed to put his case to the Court and an allotment was made to him. On motion for a prohibition, it appeared that none of the transfers under which S. claimed gave any

valid claim to a partition, or to resist a partition applied for by native owners. *Prendergast*, C.J., said: "In such a case as the present, I think prohibition ought to issue. It is manifest that the issue raised in the Native Land Court by the respondents here, in answer to the claim made by the appellants for partition, was one that the Court had jurisdiction to entertain and decide. That Court, and no other, had jurisdiction to decide upon that issue; and at first sight it might seem that, where the matter is exclusively for a particular tribunal to decide—no other Court having jurisdiction to entertain the question—prohibition ought not to go, because it appears to the Supreme Court to have decided erroneously. It seems, however, to me the proper view is that, though prohibition would not be granted before judgment on this issue, yet that the Legislature must, in the absence of express language to the contrary, have intended that the question of whether or not there is in law a valid claim to partition should not be conclusively decided by the Native Land Court. The question is, I think, one of jurisdiction; and where the Native Land Court has wrongly decided that question, the Supreme Court is empowered to prohibit, at any rate where the error is one of misconstruction of statute law: *Gould v. Gapper* (5 East 366). Here there is the misconstruction of provisions of an Act of the Legislature not on a matter of mere procedure in the Native Land Court, but directly involving rights." *Williams and Conolly*, JJ., concurred in this statement of the law: *Poaka v. Ward* (8 N.Z.L.R. 338).

In 1843, B., being a trader owing debts amounting to less than £300, obtained an order for protection under 5 & 6 Vic. c. 116, sec. 1. The debts specified in the schedule to his petition exceeded £200, and remained unpaid in 1851 when, having incurred fresh debts exceeding £200, he petitioned the County Court for protection. The Judge decided that the debts incurred at the time of the 1843 order were not to be taken into account, and therefore B. was entitled to protection as a trader "owing debts amounting in the whole to less than £300," within sec. 1 of 5 & 6 Vic. c. 116. A prohibition was refused—the construction of the statute was a matter within the jurisdiction of the Judge, and therefore, if erroneous, prohibition could not issue: *Re Tamerlane Bowen* (15 Jur. (O.S.) 1196).

In the report of *Re Bowen*, in 21 L.J.Q.B. 11, *Patteson*, J., said: "This is not exactly like *Gould v. Gapper* (5 East 345), where it was held that prohibition lies where a spiritual Court puts a wrong construction upon a statute. The County Court is different from a Court of peculiar jurisdiction. It is a temporal Court which proceeds upon the same rules as we do ourselves; and therefore we cannot interfere when it has

decided upon the construction of a statute in a matter over which it clearly has jurisdiction to inquire": *Re Tamerlane Bowen* (15 Jur. O.S.) 1196).

It being argued that prohibition would be granted to the Court of Mines if they presumed to decide contrary to the common law of England (*Vaughan v. Evans*, 2 Ld. Ray. 1408), *Barry, J.*: "The principle on which the Courts at Westminster act is illustrated in the case of *Re Tamerlane Bowen* (15 Jur. 1196). There it was held that where a County Court had a jurisdiction conferred on it, although the Judge might decide wrongly, yet the remedy against him was not by prohibition, but by appeal. Prohibition was a circuitous way of having an appeal. In the present case the defendants did appeal. In *Norris v. Carrington* (16 C.B.N.S. 396), it was held that where a Court decided a matter clearly within its jurisdiction, the Courts at Westminster would not restrain the proceedings." It was then urged that if the inferior Court, which was created by statute, misconstrued a statute, prohibition would be granted—the first principle of Government was to have all the inferior Courts interpreting the same statutes in the same way; the Supreme Court was created to keep these inferior Courts in check, and to see that what was held to be law in the Supreme Court should be also the law in the other Courts. But *Barry, J.*: "We do not think that this Court stands in the same relation to the Court of Mines as the Courts at Westminster do with regard to the University Courts, the Stannary Courts, the Admiralty and Ecclesiastical Courts, and the Courts of the Duchy of Lancaster. Those Courts are guided by peculiar laws; they do not proceed according to the common law of England, and where they come in conflict with the common law and where they deal with matters not within their jurisdiction, they render themselves amenable to the Courts at Westminster. The Court of Mines stands in a different position. It is true that it possesses peculiar powers conferred upon it by statute, and although it does not possess a common law jurisdiction, it is governed by the same principles which guide this Court. The laws of evidence are the same, the rules for the interpretation of law are the same, and as long as the Court acts within the jurisdiction conferred upon it by the statute this Court will not interfere with it. Of course where the jurisdiction is exceeded, the Supreme Court will interfere. But the matter on which this Court decided in this instance is clearly within its jurisdiction; whether the decision given was right or wrong, it is not the province of this Court to determine. It would be intolerable if we were to interfere by prohibition on every occasion when a slip is made. The Legislature has provided means of obtaining redress for errors or mis-

takes, namely by appeals, or writs of *certiorari*": *R. v. Cope*; *Re Moore v. White* (4 A.J.R. 113).

"Misconstruction of an Act of Parliament as to a point of jurisdiction is matter of prohibition in an inferior Court, but misconstruction of an Act of Parliament upon a matter which is within that jurisdiction is matter of appeal": Shortt on *Mandamus and Prohibition*, 461, 462, citing *Brett, L.J., in Denaby, &c. Co. v. Manchester Railway Co.* (3 N. & M. Railway Cases 426).

On summons before a County Court Judge the defendant pleaded judgment recovered and execution issued for the same claim. The plaintiff admitted the truth of the plea, but nevertheless the Judge found for the plaintiff. A rule for a prohibition was refused—the matter was within the jurisdiction of the County Court. In answer to *Gould v. Gapper* (5 East 345), *Coltman, J.*, said the case was not in point; "for the Judges of the spiritual Court are not Judges of the common law, but the Judges of the County Court are": *Ex parte Rayner* (5 D. & L. 342).

Justices held that premises occupied by a pilot and family, but belonging to the Crown, were rateable under sec. 79 Municipalities Act 1879. A prohibition was refused, though asked on ground of misconstruction of statute—but *held* that the statute had been properly construed. *Stephen, C.J.*: "I give no opinion on the preliminary objection that a prohibition will not lie even if the construction or the application of the law to the facts has been wrong." *Hargrave, J.*, expressly decided that the justices had jurisdiction: *Ex parte Taylor* (7 S.C.R. 407).

"But here again I consider that it is a question of the construction of an Act within the warden's jurisdiction; that in the words of *Lord Davey* in *Hooper v. Hill* ([1894] 1 Q.B. 659), the matters alleged show at most irregularity only in the exercise of jurisdiction and not excess of it, and that, therefore, following *Falvey v. Tregoweth* (16 N.Z.L.R. 341), it is a matter for appeal, not prohibition": *Howell v. Ross* (16 N.Z.L.R. 684).

The 2nd section of 20 & 21 Vic. c. 43, provides that, after the hearing and determination by justices of any information or complaint which they have power to determine in a summary way, either party may apply to the justices to state a case for the opinion of one of the superior Courts of common law; and the 6th sec. enacts that the decision of the superior Court on such special case shall be "final and conclusive on all parties." To a declaration in prohibition, defendant pleaded that the plaintiff had already taken the opinion of the Court of Queen's Bench on a special case stated by justices, on his application,

raising a question as to their jurisdiction; and that the Court had decided against him, affirming the jurisdiction of the justices. *Held*, on demurrer to the plea, that, as the finality of the decision of the Queen's Bench depended on the fact of the justices having jurisdiction to determine the complaint in a summary way, and as this Court was of opinion they had no such jurisdiction, the demurrer should be allowed. But on appeal the Court reversed this decision; it was *held* that the question before the justices depended solely on the construction they placed upon a particular statute, and whether they were right or wrong, the matter was within their jurisdiction, and not the subject of prohibition: *Devonshire v. Foot* (Ir. R. 5 Eq. 314); and on appeal, ([1900] 2 Ir. R. 211).



## CHAPTER VI.

TO RESTRAIN A PUBLIC NUISANCE  
OR THE COMMITTING OF WASTE.

Formerly, prohibition lay to restrain a public nuisance, or (in certain cases) the committing of waste.

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“ So, a prohibition lies to restrain a public nuisance : Semb. Skin. 625, 626.”—Comyn’s Digest, Prohibition (A 3).

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But “ If there were not in use a clear known *festinum remedium*, we might aid you ; but when the application of a writ of prohibition to such a case as this would confessedly be new in modern practice, and there is a clear known remedy by indictment in the ordinary course, if the parties against whom you move be pulling down the old bridge illegally, we do not feel ourselves called upon to apply any new remedy.”—*Lord Ellenborough*, C.J., in *The King v. Dorset*, JJ. (15 East at 600).

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*Coke*, C.J. : “ If this Bishop of Sarum cuts and sells the trees, and does not use them for reparation, if any man will move this, I will grant a prohibition ” ; and the other Justices seemed to agree to this : *Stockman v. Whither* (1 Rolle 86 ; 2 Bulst. 279).

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Rule for prohibition to prevent a parson committing waste : *Lord of Rutland v. Greene* (1 Keb. 557).

The Court of Common Pleas has no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possessions of his see ; at least at the suit of an uninterested person. *Semble*, that no Court of Common Law has that power. *Quaere*, if the Court of Chancery has not. *Note*, however, that at p. 129, *Heath, J.*, states that " A prohibition for waste was certainly a common law remedy ; it was, therefore, grantable at the instance of the person injured, and of no other person whatever " : *Jefferson v. Bishop of Durham* (1 B. & P. 105).

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" The Court of C.B. have no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possessions of his see, at least at the instance of an uninterested stranger ; and it is doubtful whether any of the Courts can grant such a writ : *Jefferson v. Bishop of Durham* (1 B. & P. 105)." Bacon's Abridgement, Prohibition (A.). See also Comyn's Digest, Prohibition (F. 16).

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" There appears to have been an ancient writ of prohibition which issued out of the Court of Chancery, returnable in a Court of Common Law, not to restrain an inferior Court, but to restrain the commission of waste by churchmen. That writ was taken away by the Statute of Westminster 2 (c. 14). Nevertheless, *Sir Edward Coke* appears to have expressed his intention to revive the writ. However, in *Jefferson v. Bishop of Durham* (1 B. & P. 105), *Eyre, C.J.*, seems to have disapproved of *Sir Edward Coke's* language."—*Per Pring, J. : Ex parte Baxter* (9 S.R. 201).

## CHAPTER VII.

## IMMATERIAL MATTERS — MATTERS OF DISCRETION—SMALLNESS OF AMOUNT INVOLVED—EXISTENCE OF ANOTHER REMEDY.

1. Prohibition does not lie where the inferior Court decides a matter immaterial to the issue.

2. Where a matter is within the discretion of the inferior Court prohibition does not lie to correct the exercise of that discretion.

3. If the matter is outside the jurisdiction (semble) it is no ground for refusing a prohibition that the amount involved is small.

4. The existence of another remedy is no bar to the remedy by prohibition.

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### 1. *Matters immaterial to the issue.*

“The Court Christian undoubtedly cannot try a custom: but there is no ground for a prohibition if the alleged custom be wholly immaterial to the question to be determined, so that it is perfectly indifferent which way it is found.”—*Patteson, J., in Duke of Rutland v. Bagshaw* (14 Q.B. at 889).

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### *Illustrations.*

A faculty was sought in a spiritual Court to erect an organ in a church at Halifax; the plaintiffs, believing the consent of the parishioners to be necessary, cited the latter to appear and show cause why the organ should not be erected. The parishioners appeared and objected that the consent of the parish had not been first obtained. To this plaintiffs answered (1) that as the organ was to be maintained by subscription, the expense would not be chargeable to the parish;

and (2) that the vestry had consented. The parishioners denied that they were bound by the consent of the vestry, to which it was answered that for 20, 30, or 40 years it was usual to consult the vestry, and that the parishioners during that time had been bound by the consent of the vestry. A faculty having been granted, a prohibition was sought on the ground that the custom that the parishioners were bound by the consent of the vestry was insufficiently alleged. A prohibition was refused, the Court being of opinion that the consent of the parishioners was unnecessary, and therefore it was immaterial whether they were bound by the vestry's consent or not. "The ground we go upon is that a prohibition will not be material": *Butterworth v. Walker* (3 Burr. 1689).

It was *held* that the fact that a company is not competent to become the holder of a mineral lease, though proved in evidence before the warden, is not a ground for a writ to prohibit the warden from further proceeding in a complaint laid by the company as an applicant for a mineral lease to have the amount of compensation fixed under Act No. 1251—the power of the company to have a lease was not a question for the warden to decide: "having arisen it is not material, and therefore it is not the subject for prohibition."—*Madden, C.J. : The Moe Coal Mining Co. v. Lithgow* (20 V.L.R. 80).

It is not a ground for prohibition that a bastardy complaint and summons allege that the complainant had been delivered of a bastard child more than twelve months before the complaint, to wit on a date less than twelve months before. *Rooth, J. : "It seems to me immaterial. . . . If it is a mistake, and apparently there is a mistake here, it is a matter which the justices had full power to amend and the amendment, if it had been made, could not possibly have prejudiced the defendant. It seems to me, therefore, that to ask us to issue prohibition because of an immaterial defect in the information which could have been amended, and which I think we could amend ourselves, it necessary, would be exceeding the right which this Court ought to exercise": Mulheisen v. Blott* (8 W.A.L.R. 170).

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## 2. Matters in the discretion of the inferior Court.

"The difficulty in this case is to draw the line between what is excess of jurisdiction and what is at most an indiscretion. So far as the question challenges the exercise of the registrar's discretion, we cannot interfere by pro-

hibition.”—*Davey*, L.J., in *Hooper v. Hill* ([1894] 1 Q.B. 659).

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“It is certainly not because this Court may think it would have been fairer to the defendant to have granted an adjournment and that the magistrate ought, therefore, to have granted it, that this Court will interfere. The case of *Reg. v. Biggins* (5 L.T. 605) is an authority on this point.”—*Williams*, J., in *O'Connor v. Johnston* (23 N.Z. L.R. 183).

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“The power to adjourn the hearing of a case under The Justices of the Peace Statute, 1865 No. 267, sec. 69, is a remedial power intended to prevent technical objections prevailing. It is to be exercised with discretion; but the manner in which it may have been exercised would not form ground for a prohibition.”—*Stawell*, C.J., in *Ex parte Forsman* (4 V.L.R.C.L. 55).

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#### *Illustrations.*

Where justices had power to award costs, but awarded a larger sum than the Court thought reasonable, a prohibition was refused; the justices had a discretion as to the amount: *Hill v. Pinnock* (1 Q.L.J. Supp. 45).

A prisoner had been told on his arrest that his case would be heard on a certain day, and had been advised by the apprehending constable to speak to his brother about obtaining legal assistance, and had an interview with his brother, but took no steps to procure legal assistance or witnesses, and made no objection to the case being heard, but after the case for the prosecution was closed, made an application for adjournment to procure legal assistance and witnesses, which the magistrate refused, and convicted the prisoner. On motion for prohibition, on the ground that the magistrates refused a postponement to allow the applicant to procure legal assistance, *Faucett*, J., said: “The first point is the most important, for it strikes at the very root of the administration of justice. If I could see clearly that the magis-



trates were guilty of this refusal in the way put forward by the applicant, I would certainly grant a prohibition." His Honour then detailed the facts as above and came to the conclusion that it was difficult to say that the magistrates ought to have postponed the case when the prisoner had made no efforts himself, but at the same time it would have been better to grant the postponement. "But we have now to determine a strict matter of law—whether the magistrates took a course inconsistent with natural justice. I do not see my way to come to that conclusion, though it would have been better if the postponement had been allowed." *Sir W. Manning, J.*: "On the whole I think the motion ought not to prevail. There is no question of jurisdiction here, the only question being whether the action of the magistrates was opposed to the fundamental principles of justice. That is a ground for a prohibition, and if I saw that there had been anything of that kind, I should not hesitate to grant the application. On the other hand if we see that three magistrates, sworn to do justice between man and man, take a particular course of action, we should not on light evidence come to the conclusion that they have acted harshly or unjustly. I should require plain unmistakeable evidence. I do not find that here. It may be that I have felt some doubt whether it would not have been better, on the whole, to postpone, but I start with the presumption that everything was rightly done, unless and until the contrary is shown. . . . If the postponement had been really required for the purpose of procuring evidence, I would have thought very much more of the point. . . . I can hardly believe that the magistrates would have refused the application unless it is true that the applicant said he did not care about witnesses, but wanted a lawyer. . . . On the whole, I think it is not made out that he had not a fair and reasonable means of defending himself": *Ex parte Fox* (2 S.C.R.N.S. 47).

Objection was taken at the hearing before justices that no particulars of demand accompanied the summons as required by the Justices Amendment Act, No. 565, sec. 16. The justices adjourned the hearing and gave liberty to complainant to deliver amended particulars. A rule *nisi* for a prohibition was sought on the ground *inter alia*, that the justices had no power to allow particulars to be furnished after the case came on. *Stawell, C.J.*, said: ". . . . The power to adjourn the hearing of a case under the Justices of the Peace Statute, 1865 No. 267, sec. 69, is a remedial power intended to prevent technical objections prevailing. It is to be exercised with discretion; but the manner in which it may have been exercised would not form ground for a prohibition": *Ex parte Forsman* (4 V.L.R.C.L. 55). [See now No. 1105, secs. 81, 187.]

(An appeal from justices under sec. 236, the Justices of the Peace Act 1882). *Williams, J.* "The power to grant or refuse an adjournment is discretionary. Whether, on an appeal from a magistrate on a point of law only, the circumstance that the magistrate may have exercised his discretion in a manner contrary to the principles of natural justice can be raised, it is not necessary to determine, because I am of opinion that the action of the magistrate in no way contravened these principles. It is certainly not because this Court may think it would have been fairer to the defendant to have granted an adjournment and that the magistrate ought therefore to have granted it, that this Court will interfere. The case of *Reg. v. Biggins* (5 L.T. 605) is an authority on this point": *O'Connor v. Johnston* (23 N.Z.L.R. 183).

Justices had refused to adjourn a case on the application of applicant, and heard the case in spite of the absence of a witness, who, applicant said, was a material witness. A rule *nisi* was refused, as in the circumstances of the case the justices wisely exercised their discretion in refusing the application for an adjournment: *Ex parte Gordon* (9 W.N. 144).

*Darley, C.J.* (though no application was made on the ground of natural justice), said: "Although the defendant has grave cause of complaint, yet these matters, being within the discretion of the magistrate, and, although I think that discretion to be wrongly exercised, I cannot say that the rule should be made absolute upon the grounds that the proceedings were contrary to natural justice": *Ex parte Bourke* (19 N.S.W.R. 370).

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### 3. *Smallness of amount involved.*

"It is also agreed that, if the defendant in an inferior Court makes it clear to a superior Court both in fact and law that the inferior Court is proceeding without or beyond jurisdiction, the superior Court is judicially bound *ex debito justitiæ*, to issue a writ of prohibition. In such a case, when the defendant below is the applicant for prohibition, it is admitted that the superior Court has no discretion to refuse to prohibit on the ground that the amount in dispute is small or that the application is made late, or any similar ground."—*Brett, J.*, in *Worthington v. Jeffries* (L.R. 10 C.P. 379).

“This application must be refused apart from the technical objections that have been raised. Here is a matter in which £4 is involved. An application was made to Mr. Justice *Pring* for a prohibition. His Honour refused to make the rule absolute, and dismissed the application for a prohibition, and *prima facie* his order was right. Now the appellant brings the case before the Full Court. Litigation of such a kind, involving such a small amount, is disgraceful, and I think we ought to decline to make an order in such a matter.”—*Darley*, C.J. (*Owen and Cohen*, JJ., concurring), in *Ex parte Jones* (23 W.N. 141).

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*Illustrations.*

A plaintiff claimed £17 1s. from defendant, and had a verdict for that amount. On motion for a rule *nisi* for prohibition on the ground that the Judge of the County Court had no jurisdiction, *Pollock* C.B., said: “The Court will consider whether a rule ought to be granted. The amount is so small that no rule will be granted unless it is very clear that the rule will be made absolute”: *Guardians, &c., of Lexden v. Southgate* (10 Ex. 201).

A prohibition was granted to a Magistrates’ Court where the amount in dispute was only £4: *Friedlander v. Miller* (28 N.Z.L.R. 97; 11 Gaz. L.R. 354). And see *Thompson v. Ingham* (1 L.M. & P. 216); *Ferguson v. Smith* (4 Q.L.J. 158).

A County Court Judge dismissed plaintiff’s application for further answers to interrogatories with costs, and certified for counsel. He had jurisdiction to do that, and also to fix the scale, but he did not then fix the scale. Subsequently he directed the Registrar to insert scale C. in the order, this being done without notice to the plaintiff. A Divisional Court held that a prohibition was discretionary, and refused it on the ground that plaintiff’s solicitor had acquiesced in the order. The Court of Appeal, while feeling it difficult to say whether there had been excess of jurisdiction or mere irregularity, refused to allow an appeal, being of opinion that after a hearing before two Courts, and especially considering the smallness of the amount (which at the utmost was the difference between scale C. and scale B.), the appeal should not be entertained: *Jackson v. Copland* (8 T.L.R. 295).

A rule *nisi* was granted on the ground that though the adjudication

was by five justices, only two signed the warrant of possession in a case under the Tenements Recovery Act, but *Hargrave, J.*, while agreeing that the warrant ought to be signed by a majority, said that it was such a trilling matter, and the amount involved so small, and the warrant so easily amendable, that there ought to be no prohibition: *Ex parte Mullens* (14 S.C.R. 183).

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#### 4. *Other remedy.*

“A preliminary objection was taken by *Mr. Groom*, who appeared to show cause, that there was some other remedy by way of appeal and that the Court would not grant a prohibition until every other remedy had been exhausted; and he suggested that this had been laid down by this Court. The Court, in my opinion, did not lay down anything of the kind, and there is nothing to indicate that the learned Judges intended to lay down anything in the nature of a new doctrine.”—*Griffith, C.J.*, in *R. v. Brisbane JJ.* (11 Q.L.J. 77).

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“If called upon we are bound to issue our writ of prohibition as soon as we are duly informed that any Court of inferior jurisdiction has committed such a fault as to found our authority to prohibit, although there may be a possibility of correcting it by appeal.”—*Denman, C.J.*, in *Burder v. Veley* (12 A. & E. at 263).

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#### *Illustrations.*

Upon application for a prohibition to the Insolvency Court, objection was made that the Court would not grant a prohibition if the Legislature had given an adequate remedy. But *Higinbotham, C.J.*: “If a party chooses to insist on it as a right, is he not at liberty to do so? Besides was it not a question for the discretion of *Mr. Justice Williams*, who made the rule *nisi*?” *Holroyd, J.*: “There have been prohibitions granted against the Court of Mines, where there was also an appeal.” Counsel then urged that in *Ex parte Levy* (1

V.L.R. (L) 271) the Court refused a prohibition because there was an appeal. *Per curiam*: "We overrule the preliminary objection." *Kerferd, J.*: "I would add that if there is one remedy which the Court will grant more swiftly than another, it is to issue a writ of prohibition against an inferior Court if it has no jurisdiction": *In re Sinclair; Ex parte Watson* (15 V.L.R. at 738).

It by no means follows that because the misconstruction of an Act of Parliament by the Ecclesiastical Court may be corrected on appeal, it is not also ground for prohibition: *White v. Steele* (12 C.B.N.S. 383).

*Griffith, C.J. (Cooper and Paul, JJ., concurring)*, said: "But it is said that the Court will not grant prohibition because there is another remedy by way of appeal." His Honour then *held* that there was no appeal on a question of costs. "But supposing there was an appeal to the District Court, then it is said this Court will not grant a prohibition if there is another remedy. I protest against that being taken as the doctrine of this Court. I do not think it was so intended to be laid down by any Judge. It is contrary to all the English authorities. Some argument was addressed to the Court on the same point at the last sittings of the Full Court in the case of *R. v. The Justices of North Brisbane; Ex parte The Treasurer of Queensland*, and we, in that case, pointed out that there was no such rule as suggested. It is true there are one or two *dicta* in cases in this Court, as reported, which suggest that prohibitions would be granted or refused on the same discretionary grounds as a mandamus; that is, it would be refused if there was any other remedy. I do not think the Court intended to lay down any such doctrine. If so, it was establishing a new doctrine peculiar to Queensland. The case of *Broad v. Perkins* (21 Q.B.D. 533), decided by the Full Court of Appeal in England, defined the cases in which prohibition might be refused, notwithstanding that there had been an excess of jurisdiction in the Court below. Ordinarily the Court will interfere to prevent an excess of jurisdiction by an inferior Court, but it may, in its discretion, refuse to grant that relief under certain circumstances. It was pointed out in that case that when the party applying for a prohibition has lain by, the Court may decline to grant the writ." His Honour then read the judgment in *Broad v. Perkins*, and continued: "In my judgment that case indicates the limits of the discretion of the Court to refuse prohibition in a case of excess of jurisdiction by an inferior Court. In other cases, which do not fall within those exceptions, the Court is bound to interpose to confine an inferior Court within its proper jurisdiction. I believe that this is the clear law of the realm. The cases referred to in Queens-



land, in which there are said to be *dicta* inconsistent with that doctrine, were all cases that fell within the exceptions. I think in this case there has been a clear excess of jurisdiction, whether the excess is or is not apparent on the face of the proceedings, and that we are bound to make the rule absolute, the justices having dealt with a subject with which they had no concern": *R. v. The Justices of South Brisbane*; *Ex parte Zajami* (11 Q.L.J. 81).

"*Buller, J.*, truly observes that the cases reported to have occurred in the seventeenth century under the head of prohibition are not to be reconciled, nor all supported. He might, perhaps, have added that scarcely one of them can be right if the doctrine of refusing prohibition, where appeal lies, could prevail."—*Denman, C.J.*, in *Burder v. Veley* (12 A. & E. at 261).

"The cases in *East*, then, seem to establish, and consistency of reasoning requires, that the power of prohibition is in no case taken away by the privilege of appeal": *Ibid.*, at 263.

A statute provided that offences against the Act were to be prosecuted before the Commissioners of Excise, with an appeal to Commissioners of Appeal, whose decision was to be final. On appeal to the Commissioners of Appeal, they acted on the minutes of evidence given before the Commissioners of Excise. A motion for a prohibition was opposed on the ground that where a statute creates a jurisdiction and gives an appeal, that is the only remedy, and that prohibition was taken away by the words declaring the decision final. But a prohibition was granted *quoad* the admitting of such evidence: *Breedon v. Gill* (5 Mod. 271).

A prohibition was granted though a new trial could have been had: *Ex parte Mimna* (16 W.N. 209).

A prohibition was sought against a judgment of the Small Debts Court for £3 14s. 6d., in respect of the dishonour of a cheque. It was objected that prohibition did not lie; that where the judgment of an inferior Court is erroneous, appeal is the only remedy. *Chubb, J.*: "The objection taken by Mr. *Jameson*, that prohibition will not lie in this case is, in my opinion, unsound. The authorities he cites for the proposition are not in point. *Griffin v. Ellis* (3 P. & D. 398), refers to an Ecclesiastical Court. The text writers in Short & Mellor's Crown Practice, at p. 74, say: 'It is still somewhat doubtful whether the erroneous proceedings in the inferior tribunal be questioned by appeal or by prohibition,' but they cite cases which go to show that the privilege of appeal does not take away the right to prohibition. *A fortiori* is the right to prohibition where, as here, the right of appeal is restricted to cases of £10 and upwards. If an inferior Court assumes

jurisdiction on a point of law, this Court will interfere: *Brown v. Cocking* (L.R. 3 Q.B. 672); *Elston v. Rose* (L.R. 4 Q.B. 4). We have, however, a decision of this Court to establish the right of prohibition to a Small Debts Court: *Pettigrew v. Townley* (1 Q.L.R., Pt. II., p. 31). *per Lutwyche, J.* This objection, therefore, fails": *Ferguson v. Smith* (4 Q.L.J. 158).

Sec. 50 Resident Magistrates Act 1867 enables the defendant to apply for a new trial. *Chapman, J.*: "Does that take away prohibition? The Court will not allow its jurisdiction to be taken away by a section which operates as a side wind": *Gregg v. Krull* (1 N.Z. Jur. 132).

Plaintiffs sued defendant in a County Court; defendant resided and carried on business in Scotland, but plaintiffs obtained leave under sec. 74 County Courts Act 1888, to enter the plaint on the ground that the cause of action arose wholly or in part within the district of that Court. Plaintiffs then obtained leave, under Order VII., rule 41 (c.) (1), of the County Court Rules 1903, to serve defendant in Scotland and upon service upon him the defendant applied for a prohibition to restrain the action. It was urged that prohibition should not be granted because of the alternative procedure under Order VII., r. 49, County Court Rules, whereby a defendant may move to set aside a summons served on him, but the prohibition was granted; the fact that there was this alternative remedy did not take away the applicant's remedy by prohibition. But *Lord Alverstone, C.J.*, added: "The case, to my mind, would have been different if it could have been suggested that there was any further evidence to be adduced which would have made it more expedient for the matter to be determined by means of an application to the County Court Judge under Order VII., r. 49": *Channel Coalng Co. v. Ross* ([1907] 1 K.B. 145).

"But there is a preliminary question if the remedy in this case is appeal or prohibition. There is no doubt that the jurisdiction as to prohibition will not be exercised where there is an appeal. That is the general rule; and there is no doubt there would be an appeal from the decision of the Court on this point, and therefore, on general principles, this would be a case for appeal and not for prohibition. In the English cases this point does not seem to have been decided. There are cases reported in the books, and which have been looked up with a great deal of industry by Mr. *Nesbit*, showing that the English Courts have entertained this question of territorial jurisdiction in both appeal and prohibition, and he contended that prohibition had only gone in cases in which the amounts were below the appealable

sum. But Mr. *Symon*, on the other hand, pointed out a case in which the amount was over that sum, and yet a prohibition went, so that in England, the question is still *res integra*. It is not altogether so in this colony, because it arose in *Watts v. Giesecke* (4 S.A.L.R. 123), which was an interpleader, in which the territorial jurisdiction appears to be precisely the same as it is in England. That decision would be binding upon us in this case, if that had been an ordinary action, and this action had been on the contract. But that was only an interpleader, so that as to ordinary actions the point was left open.” *Held*, that the right of appeal was a reason for refusing prohibition..—*Way, C.J.*, in *McMullen v. McCrae* (17 S.A.L.R. 93).

Justices granted a warrant of possession under the Landlord and Tenant Statute 1864, secs. 90, 91, 93, 96, 97. A rule *nisi* for prohibition was sought on the ground that the tenant had had no notice of the application to the justices. But the Court pointed to secs. 96 and 97: “The tenant may have a stay of execution of the warrant on giving security to prosecute an action of trespass against the person who obtained it. The Court will not, therefore, interfere in this summary way”: *Ex parte Carey*; *Re Bottrell* (4 V.L.R. C.L. 408). [See No. 1108, secs. 92, 93, 95, 98, 99.]

“The question then arises—What is the remedy against the judgment of the two Courts? The District Courts Act 1891 provides that an appeal may be had by special case. If there had been no appeal by special case or otherwise, from the District Court, the Full Court would have granted a prohibition in order to restrain these inferior jurisdictions within the limits assigned them by law. But here the defendant has invoked the aid of the Court, and of a very expensive, extraordinary, and peculiar jurisdiction, rarely and reluctantly exercised by the Court except where justice absolutely demands it, and certainly not where there is a less expensive and a speedy remedy. That being so, we think that the proper remedy would have been to have asked the District Court Judge for a special case. We will not grant a prohibition.”—*Per Lilley, C.J.* *Harding and Real, JJ.*, concurred. *Re Eastern Miners G. M. Co.* (4 Q.L.J. 153, 159).

Judgment was given against a defendant who had not been served with process, and had therefore no opportunity of being heard. “The authorities show that prohibition ought not to issue if the inferior Court has jurisdiction. It is not sufficient in cases like this to show that the course complained of is against natural justice, but also that there is no other means of obtaining redress. The defendant ought to have moved the District Court for a new trial”: *Ex parte Bucknell* (6 S.C.R. 96).

## CHAPTER VIII.

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**WHETHER WRIT DISCRETIONARY  
OR OF RIGHT.**

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D.—MEANING OF POINT TAKEN IN THE INFERIOR COURT, p. 371.

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Ordinarily the writ is to be granted ex debito justitiae.

But where the applicant has been guilty of delay, or has acquiesced in, or waived the want of jurisdiction (without excuse for such delay,

acquiescence, or waiver), or has failed to discharge the onus which lies upon him to show his right to the writ—in such cases, the grant of the writ is in the discretion of the Court.

Provided that if the defect of jurisdiction (however such defect arises), is apparent on the face of the proceedings, or the applicant has taken the objection in the inferior Court, the grant of the writ is *ex debito justitiæ*, notwithstanding delay, acquiescence, or waiver.

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“The result of the authorities appears to be that:—

1st.—Prohibition will, in all cases where it lies, issue at any time after the commencement of the action and before judgment.

2nd.—It will issue after judgment in all cases where the want of jurisdiction is apparent on the face of the proceedings.

3rd.—It will also issue after judgment in all other cases, except where the party applying appears by his conduct to have acquiesced in the jurisdiction of the Court below.

4th.—In all cases where it will issue after judgment, it will also issue after execution, except—

1st.—Where there is no one having a right to interfere in the matter who can be prohibited.

2nd.—Where there is nothing capable of being restored, or to which the prohibition can attach.”

—Lloyd’s Treatise on the Law of Prohibition (1849), p. 22.

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“It was insisted, however, that there was some substantial difference between the case of a patent defect of jurisdiction and a latent one, disclosed, as here, by apt averment and admission or proof. But this notion, *as applied to prohibition before judgment*, is quite antiquated. . . . and it is now settled law that prohibition goes not



only for a patent defect, but also upon a surmise . . . or suggestion of collateral matter. . . . There is, indeed, a distinction after sentence between a patent and a suggested defect, for if the party below, whether plaintiff or defendant, thinks proper, instead of moving for a prohibition, to proceed to trial in the special or inferior Court, and is defeated, then, if the defect be of power to try the particular issue only (*defectus triationis*, as it has been called), the right to move for a prohibition is gone. If the defect be of jurisdiction over the cause (*defectus jurisdictionis*) and that defect be apparent upon the proceedings, a prohibition goes after sentence: *Roberts v. Humby* (3 M. & W. 120). If it be not apparent, but the party, instead of moving for a prohibition, pleads in the special or inferior Court the facts ousting the jurisdiction, and such Court improperly decides that it has jurisdiction, he may, notwithstanding such decision, upon satisfying a superior Court that it was erroneous, obtain a prohibition: *Thompson v. Ingham* (14 Q.B. 710), followed in *Chew v. Holroyd* (8 Ex. 249) and *Marsden v. Wardle* (3 E. & B. 695). Where, however, the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the Crown is not taken away, for mere acquiescence does not give jurisdiction: *Knowles v. Holden* (22 L.J. Ex. 223); yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the Court would decline to interpose, except, perhaps, upon an irresistible case, and an excuse for the delay, such as disability, malpractice or matter newly come to the knowledge of the applicant: see *Case of the*

*Admiralty* (12 Co. Rep. 77).”—*Willes, J.*, in *Mayor, &c., of London v. Cox* (L.R. 2 H.L. 281–283).

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#### SECTION I.—GENERAL RULE.

##### A.—THE WRIT IS ORDINARILY GRANTABLE EX DEBITO JUSTITIAE.

“ This writ is granted *ex debito justitiae* (1 Sid. 65 ; *per* two justices, Hide Cont. Ray. 92 ; *per* all the justices, 3 Jac. 2 Inst. 607 ; *per Keeling, J.*, Hide Cont. 1 Sid. 178), and being intended for keeping every Court within its proper jurisdiction the law as to prohibitions cannot be changed but by Act of Parliament ” : R. 2 Inst. 601 ; Comyn’s Digest, Prohibition (C.).

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“ . . . . It is true that there are one or two *dicta* in cases in this Court, as reported, which suggest that prohibition would be granted or refused on the same discretionary grounds as a mandamus ; that is, it would be refused if there was any other remedy. I do not think the Court intended to lay down any such doctrine. If so, it was establishing a new doctrine peculiar to Queensland. The case of *Broad v. Perkins* (21 Q.B.D. 533), decided by the Full Court of Appeal in England, defined the cases in which prohibition might be refused, notwithstanding that there had been an excess of jurisdiction in the Court below. Ordinarily the Court will interfere to prevent an excess of jurisdiction by an inferior Court, but it may, in its discretion, refuse to grant that relief under certain circumstances. It was pointed out in that case that when the party applying for a prohibition has lain by, the Court may decline to grant the writ.” . . . His Honour then cited the passage above from *Cox v. Mayor of London*, and added . . . . “ In my judgment that case indicates the limits of the discretion of the Court to refuse prohibi-

tion in a case of excess of jurisdiction by an inferior Court. In other cases, which do not fall within those exceptions, the Court is bound to interpose to confine an inferior Court within its proper jurisdiction. I believe that this is the clear law of the realm. The cases referred to in Queensland, in which there are said to be *dicta* inconsistent with that doctrine, were all cases that fell within the exceptions. I think in this case there has been a clear excess of jurisdiction, whether the excess is or is not apparent on the face of the proceedings, and that we are bound to make the rule absolute, the justices having dealt with a subject with which they had no concern.”—*Griffith*, C.J., in *R. v. Justices of South Brisbane* (11 Q.L.J. 81).

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“It is also agreed that, if the defendant in an inferior Court makes it clear to a superior Court, both in fact and law, that the inferior Court is proceeding without or beyond jurisdiction, the superior Court is judicially bound *ex debito justitiae* to issue a writ of prohibition. In such a case when the defendant below is the applicant for prohibition, it is admitted that the superior Court has no discretion to refuse to prohibit on the ground that the amount in dispute is small, or that the application is made late, or on any similar ground.”—*Brett*, J., in *Worthington v. Jeffries* (L.R. 10 C.P. 379).

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“The writ of prohibition at suit of a party is not, as it was thought to be by some eminent Judges at the close of the seventeenth century (see *per Holt*, C.J., *Clay v. Snelgrave* (1 Ld. Ray. 576), and the decision of the same Judge in *Wharton v. Pits* (2 Salk. 548), overruled in *Velthusen v. Ormsby* (3 T.R. 315)), in the discretion of the Court. This erroneous opinion may in part account for the fact that the cases reported to have occurred in

the seventeenth century and the early part of the eighteenth under the head of prohibition, are not to be reconciled with one another, or with earlier and later authorities. The law upon this question of discretion is thus stated in the judgment of the Queen's Bench in *Burder v. Veley* (12 Ad. & E. 263): 'If called upon we are bound to issue our writ of prohibition as soon as we are duly informed that any Court of inferior jurisdiction has committed such a fault as to found our authority to prohibit, though there may be a possibility of correcting it by appeal. . . . The question then remains, what are the defects that authorise and require us to issue the writ of prohibition? The answer is that they are in every case of such a nature as to show a want of jurisdiction to decide the case before them: *Gardner v. Booth* (2 Salk. 548). In whatever stage that fact is made manifest to us, either by the Crown or by one of its subjects, we are bound to interpose.' The writ, however, though it may be of right, in the sense that upon an application being made in proper time, upon sufficient materials, by a party who has not, by misconduct or laches lost his right, its grant or refusal is not in the mere discretion of the Court, is not a writ of course, like a writ of summons in an ordinary action, but is the subject of a special application to the Court upon affidavit. . . ."

—*Willes, J., in Mayor, &c., of London v. Cox* (L.R. 2 E. & L., at 278, 279).

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"All the Court were of opinion that prohibitions are grantable *ex debito justitiæ* (and not honorary and in the discretion of the justices, as Hob. 67) and to prove this, *Windham, J.*, cites the case of *Worts v. Clyston* (Cro. 2, 350)": *Sergeant Morton's Case* (1 Sid. 65).

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"But all the Judges agreed that the granting of prohibitions is not a discretionary act of the Court, but

are grantable *ex debito justitiæ*, and they denied my Lord Hobart's opinion in his Reports 67, which Roll, C.J., they said, had frequently done before": *Woodward v. Bonithan* (Sir T. Raym. 3).

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"A prohibition is not a discretionary proceeding."—*Per Parke, B. : Knowles v. Holden* (24 L.J. Ex. 223).

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"Wherever we have prohibitive jurisdiction to prohibit, we are, in my opinion, bound to exercise it *ex debito justitiæ*, and not *ex gratia*, or as a mere matter of discretion. For, though some difference of opinion has existed on this point, as appears from Bacon's Abridgement, Prohibition (B.), yet such I take to be the effect of the answer of all the Judges of England in the *Articuli Cleri*, in the 3 Jac. 1, as given by *Coke* in the Second Institute, p. 607, where they say that 'prohibitions are not to be granted of favour, but of justice'; and so it was held in *Sergeant Morton's Case* (1 Sid. 65), and by all the Judges of the King's Bench in *Woodward v. Bonithan* (Sir T. Raym. 3); and in that view, whatever may have been said by individual Judges, I entirely concur."—*Cockburn, C.J., in Martin v. Mackonochie* (3 Q.B.D. 749, 750).

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#### *Illustrations.*

A clergyman was reported to his bishop for illegal practices, and subsequently the Archbishop, under 37 & 38 Vic. c. 85, directed the Court of Arches to hear the matter of the complaint "at any place in London or Westminster, or within the diocese of Rochester, as you may deem fit" (sec. 9 of the Act specifying the place at which the trial should be held). The Judge heard the matter at a place that was not within the limits defined. Notice was given to the clergyman, the case was heard in his absence, and he was adjudged guilty, and a monition issued to him. On his non-compliance with the monition



he was pronounced guilty of contempt, and imprisoned. A prohibition was granted—the Judge had no power to sit at any place beyond the limits fixed by the Archbishop; the provisions of the statute fixing the place of hearing were mandatory and the statutory jurisdiction could not be exercised without complying with those conditions. “Although we see that this is a matter of the purest technicality, yet, if the objection taken goes to the root of the jurisdiction, we are bound, in the administration of the law, to act accordingly” : *Hudson v. Tooth* (3 Q.B.D. 46).

Defendant pleaded a modus which the Ecclesiastical Court held to be insufficient; defendant appealed to the Court of Arches, but his appeal was dismissed with costs. He now obtained a prohibition to both Courts—the plea was good, and ousted their jurisdiction. The argument that the only object was to prevent the plaintiff below from getting his costs was not sufficient to prevent the granting of the prohibition. The Court had no jurisdiction and the writ must go : *Darby v. Cosens* (1 T.R. 552).

An Ecclesiastical Court determined a suit against applicant, and ordered him to pay costs. The Court had no jurisdiction, as prescription was alleged on both sides, and that Court cannot determine a prescription. A prohibition was granted. If the sentence of the Ecclesiastical Court was a nullity, their award of costs must be so too. “And Lord *Mansfield* said that though he was very sorry that the Court were obliged to grant the prohibition (because the party applied for it only to get rid of paying the costs occasioned by his own vexatious suit), yet he thought they could not avoid doing it” : *Paxton v. Knight* (1 Burr. 314).

R. bought alleged stolen goods from D., applicant being the owner. D. was committed for trial for stealing, but the Attorney-General declined to file a bill. A constable had seized the goods under a search warrant issued at the instance of the applicant. After the refusal to file a bill, R. obtained an order from justices under sec. 4 of 19 Vic. No. 24, that the goods be delivered to him. Applicant obtained a rule on the ground that the justices had no jurisdiction to make the order under that Act. It was argued that it was useless to grant a prohibition, as the constable could hand the goods to R. without any order: the effect of granting a prohibition would not prevent him handing the goods to R. But *Darley, C.J.* : “It appeared to him that it was useless to grant this prohibition, but where a Judge saw that a magistrate had acted without jurisdiction, it was his duty to grant a prohibition, no matter how useless the prohibition might be” : *Ex parte Perrott* (15 W.N. 243).

**B.—ERRONEOUS VIEW THAT THE GRANT IS DISCRETIONARY.**

“ *Gould*, J., said he was of opinion that prohibitions were grantable of right, though it had been controverted in his time. To which *Holt*, C.J., said that *Hale*, C.J., and *Wyndham*, J., held prohibitions to be discretionary in all cases ; but *Kelynge*, C.J., was of the contrary opinion. And he said he did not esteem them to be matter of right ” : *Clay v. Snelgrave* (1 Ld. Ray. 576).

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*Jervis*, C.J. : “ A prohibition is not a matter of absolute right.” *Cresswell*, J. : “ We are not bound to grant a prohibition *ex debito justitiæ* ” : *Re Birch* (15 C.B. 743).

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“ In this case, as in several other cases, it was said by the *Chief Justice* that prohibitions are discretionary, but this was denied by *Keeling*, J., and according to his opinion it has been settled all my time ” : *Lord Admiral v. Linsted* (1 Sid. 178).

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*Hide*, C.J. : A prohibition doth not lie, and he affirmed that such writ is *ex gratia* and not *ex debito justitiæ* ; but *Kelynge* and *Twisden*, JJ., positively denied that : *Ford v. Welden* (Sir T. Raym. 91).

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“ The grant of the writ is discretionary ” : *Hitchin Parish Case* (Comb. 148).

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**C.—WHEN THE APPLICANT IS A STRANGER.**

“ So, where the Court has no jurisdiction, a prohibition may be granted upon the request of a stranger, as well as the defendant himself ” : 2 Inst. 607 ; *Comyn's Digest*, Prohibition (E.).

“ These authorities show that the ground of the decision, in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed. If this were not so, it seems difficult to understand why a stranger may interfere at all. If this be so, on what principle can there be any distinction in the action of the superior Court dependent upon the means by which or the persons by whom it is informed of the breach of order, which is a breach of the prerogative ? If it is the absolute duty of the superior Court to enforce order on being convinced of a breach of it by information given by the defendant in the suit below, why should it be a less absolute duty if it is convinced of the same breach of order by information given by a stranger ? Order is no less broken, the prerogative is no less invaded ! And if the smallness of the matter in dispute is to be a ground for non-interference, still more if delay in application for the writ of prohibition is to be a ground, they would seem to be stronger grounds if the defendant is to be treated as the party whose interest is to be protected, than if the interference is to be based only on the necessity of preserving administrative regularity or order. Assume that the defendant in the suit is in the wrong, there may be no damage in fact to him by the declaration of his liability being made by one Court rather than by another. It is true that there may be, as by his being cited to a distance, or into a Court of more expensive procedure. But these difficulties may exist, although the Court has jurisdiction. It follows from this view, also, that the real ground of the interference by prohibition is not that the defendant below is individually damaged, but that the cause is drawn *in aliud examen*, that public order in administration of law is broken. And inasmuch as the

duty of enforcing such order is imposed on the superior Courts, and the issue of a writ of prohibition is the means given to them by law of enforcing such order, it seems to us that, upon principle, and in the absence of enactment, it must be their duty to issue such writ whenever they are clearly convinced by legal evidence, by whomsoever brought before them, that an inferior Court is acting without jurisdiction or is exceeding its jurisdiction. And thus, in the third answer in the case of the *Articuli Cleri*, the duty is declared in absolute terms applicable to all cases: 'Prohibitions by law *are to be* granted at any time to restrain a Court to intermeddle with or execute anything which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary.' And in *Wadsworth v. Queen of Spain* (17 Q.B. 171): 'Therefore, this Court, vested with the power of preventing all inferior Courts from exceeding their jurisdiction to the prejudice of the Queen or her subjects, *is bound* to interfere when duly informed of such an excess of jurisdiction.' And again: 'The garnishee, at all events, is a 'stranger' on whose information and complaint of the excess of jurisdiction in contempt of the Crown, we *shall be bound* to correct it by prohibition' (p. 217). It is true that there is in *Foster v. Berridge* (4 B. & S. 187), a most weighty and formidable *dictum* in favour of the alleged distinction between information brought forward by a stranger, and by the defendant in the suit below. But, after anxious consideration, we are led to doubt whether the exact point, as now laid before us, was presented to the minds of the Judges in that case. We doubt whether the point was presented to the minds of the Judges that they could refuse to prohibit, if both on the facts and the law they were clear that an inferior Court was acting without jurisdiction. In that case it is obvious that there was that uncertainty as to the law which has always been held to be a justification to a Court to refuse to prohibit,

or to direct a declaration in prohibition. On the first point, therefore, we are of opinion that, whether the superior Court be informed by the defendant or the plaintiff in the suit in the Court below, or by a stranger, the only discretion which the superior Court has to refuse a prohibition is if it doubt in fact or law whether the inferior Court is exceeding its jurisdiction, or is acting without jurisdiction; but if the superior Court is clear in fact and in law that the inferior Court is acting in excess of its jurisdiction, or without jurisdiction, it cannot rightly refuse to enforce public order in the administration of the law, by refusing either to issue a writ of prohibition, or to put the plaintiff in prohibition to declare in prohibition": *Brett, J.* (delivering the judgment of *Brett, Grove and Denman, JJ.*), in *Worthington v. Jeffries* (L.R. 10 C.P. 379).

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The co-respondent to a divorce suit had been ordered to pay costs, although the suit was dismissed. He now sought a prohibition, but this was denied him, as he was a stranger. "I entirely concur in the proposition that, although the Court will listen to a person who is a stranger, and who interferes to point out that some other Court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that is not *ex debito justitiæ*, but a matter upon which the Court may properly exercise its discretion; as distinguished from the case of a party aggrieved, who is entitled to relief *ex debito justitiæ* if he suffers from the usurpation of jurisdiction by another Court": *Cockburn, C.J.*, in *Re Foster v. Foster* (4 B. & S. at 199). *Wightman, Crompton, and Blackburn, JJ.*, concurred.

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But "the law is well settled that when a stranger comes to a superior Court for a writ of prohibition, he



must show that the inferior Court is exceeding its jurisdiction both in fact and in law, and that it is a matter of discretion whether or not the superior Court shall set it aside. In the case of *In re Forster* (4 B. & S. 187), *Cockburn*, C.J., says: 'I entirely concur in the proposition that, although the Court will listen to a person who is a stranger, and who interferes to point out that some other Court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that is not *ex debito justitiæ*, but a matter upon which the Court may properly exercise its discretion, as distinguished from a case of a party aggrieved, who is entitled to relief *ex debito justitiæ* if he suffers from the usurpation of jurisdiction by another Court.' The same point came indirectly before the House of Lords in *Mayor, &c. of London v. Cox* (L.R. 2 H.L. 239), when *Willes*, J., after citing the passage from *Cockburn*, C.J., in the case of *In re Forster*, which he adopted, added: 'Such a discretion, once exercised, cannot be made the subject of review in a Court of Error.' In that view of the case eight Judges concurred. On the other side, there is the recent case of *Worthington v. Jeffries* (L.R. 10 C.P. 379), where it appears to have been held that, when a superior Court is clearly of opinion, both with reference to the facts and the law, that an inferior Court is exceeding its jurisdiction, it is bound to grant a writ of prohibition, whether the applicant is the defendant below, or a stranger. Here we have the opinions of three Judges against eight, and I elect to follow the opinion of the greater number, which appears to be in accordance with common sense, and lays down the rule that when both parties to the action wish the inferior Court to decide it, a stranger should not, as a matter of course, prevent it. I take this view, and hold that it is within the discretion of the superior Court, and in the exercise of that discretion I discharge the writ of prohibition, with costs."—*Jessel*, M.R., in *Chambers v. Green* (L.R. 20 Eq. 552).

“ It is true that in *Chambers v. Green*, the Master of the Rolls expressed his dissent from that view of ours. But, notwithstanding the respect which we all feel to be due to everything that falls from that eminent Judge, I do not think that that *dictum* at all derogates from the authority of *Worthington v. Jeffries*.”—*Brett, J.*, in *Ellis v. Fleming* (1 C.P.D. 237).

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“ Another ground upon which this rule ought to be discharged is upon the distinction which was much relied on by my brother *Blackburn* as well as myself in *Foster v. Foster* (4 B. & S. at 198, 203), viz., that in the exercise of the jurisdiction by prohibition, the Court will not interfere on the application of a person who is a stranger and not in any way interested in the subject matter of the suit sought to be prohibited, nor aggrieved by the alleged excess of jurisdiction.”—*Cockburn, C.J.*, in *R. v. Twiss* (L.R. 4 Q.B. at 413).

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“ It has long been settled that, where an objection to the jurisdiction of an inferior Court appears on the face of the proceedings, it is immaterial by what means, or by whom, the Court is informed of such objection. The Court must protect the prerogative of the Crown and the due course of the administration of justice by prohibiting the inferior Court from proceeding in matters as to which it is apparent that it has no jurisdiction.”—*Lord Halsbury*, in *Farquharson v. Morgan* ([1894] 1 Q.B. 552).

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#### SECTION II.—CASES IN WHICH THE GRANT IS DISCRETIONARY.

“ On the question whether the granting of a prohibition was discretionary or of right, it was said by Mr. Justice *Willes* in *The Mayor of London v. Cox* (L.R. 2 H.L. 239,

at 283), that 'where, however, the defect is not apparent and depends upon some fact in the knowledge of the applicant which he has an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection and without moving for a prohibition in the first instance . . . yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the Court would decline to interfere except, perhaps, upon an irresistible case and excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant.' In the case of *Broad v. Perkins* (21 Q.B.D. 533), in which six Judges of the Appeal Court of England sat together—a most unusual occurrence—they said that this proposition was to be accepted as law, and they thought that the House of Lords had adopted it. . . . I am sure that this Court never intended to dispute the rule adopted in *Broad v. Perkins*. The cases referred to in argument all fell within the exceptions mentioned as cases in which prohibition might be refused in the discretion of the Court."—*Griffith, C.J.*, in *R. v. Justices of Brisbane* (11 Q.L.J. 77).

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"As I understand the law, prohibition lies *ex debito justitiæ*, save where the facts bring the case within the exceptions pointed out in *Broad v. Perkins* (21 Q.B.D. 533)."—*Griffith, C.J.*, in *R. v. Brisbane JJ.*; *Ex parte Treasurer of Queensland* (11 Q.L.J. 77).

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"Where, however, the defect is not apparent, but depends upon some fact in the knowledge of the applicant, which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse,

to allow that Court to proceed to judgment without setting up the objection and without moving for a prohibition in the first instance; yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the Court would decline to interpose, except, perhaps, upon an irresistible case, and an excuse for the delay such as disability, malpractice, or matter newly come to the knowledge of the applicant. This rule, however, does not affect the right of the Crown to claim a writ of prohibition at any stage.”—*Lord Esher*, in *Broad v. Perkins* (21 Q.B.D. at 534).

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A defendant had not appeared in an action in the Salford Hundred Court, and, upon judgment against her, sought a prohibition, which was refused by the Court of Appeal on the ground that the Salford Hundred Court Act (31 & 32 Vic. c. 130, secs. 6, 7) takes away the jurisdiction to grant a prohibition. A Divisional Court had granted a prohibition, but this order was reversed by the Court of Appeal. *Romer*, L.J., said that he took the view that the grant was a matter of discretion, as the defect did not appear on the face of the proceedings. “It is said that the Judge at Chambers did not exercise any discretion, but merely dealt with the question as one of law. I do not know how this may be; but, even if he did exercise his discretion, there is an appeal, the discretion to be exercised being a judicial discretion, and I think that in a case like this we ought to exercise our discretion by refusing a prohibition”: *Payne v. Hogg* ([1900] 2 Q.B. 43).

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**A.—DELAY, ACQUIESCENCE, WAIVER, POINT NOT TAKEN IN THE INFERIOR COURT.**

“Where a party was sued in a District Court in a case over which, as he conceived, such Court had no jurisdiction,

and he intended to take an objection to this want of jurisdiction, his proper course was to come to the Supreme Court for a prohibition. Although he might come for such prohibition even after judgment, he was never in such a case so safe as in coming before judgment. The Court would no doubt in certain cases grant a prohibition after judgment and execution, but the applicant's position might be prejudiced by delay, or his having done something which would amount to a submission to the Court below, and a waiver of his objection against its jurisdiction. For these reasons he might be deprived of his right to a prohibition, although, had he applied earlier, that right might have been sustainable. But there were two classes of objections to want of jurisdiction. If the objection was that the Court below had no jurisdiction over the subject matter of the suit—as, *e.g.*, where it was an action for criminal conversation, or one directly involving title to land—a prohibition must necessarily go at any stage, because no man could by consent give jurisdiction to a Court from which such jurisdiction was legally withheld; nor could any Court acquire and exercise such jurisdiction by any consent of its suitors. But where the case was one *prima facie* quite within the jurisdiction of the Court, and where the objection to jurisdiction—such as one of non-residence—was taken in the Court itself in the first instance, instead of being raised by application to the superior Court for prohibition, the Court below had jurisdiction to deal with that objection”: *Ex parte Nicholson* (Legge 1400); *Turner v. Nicholson* (1 S.C.R. 171 n).

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“Where the objection to the jurisdiction is not as to the subject matter, but only as to the exercise of that jurisdiction over the defendant (*e.g.*, by reason of his residence beyond the district) such objection will be waived by submitting to the jurisdiction, or from circumstances



of delay.”—*Stephen, C.J.*, in *Turner v. Nicholson* (1 S.C.R. 171 n); *Ex parte Nicholson* (Legge 1400).

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“ If a man be sued out of his diocese, and there answers without taking exception to it, and afterwards sentence is given against him, he shall not have a prohibition, because he had not taken exception to the jurisdiction before, but had affirmed the jurisdiction there. P. 15 Ja. B.R., *per curiam*. Prohibition denied in such case between *Pudsey* and *Richardson* ” : *Viner’s Abridgement*, Prohibition (L.) (a) (1).

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“ In the case of *Mendyke v. Stint* (2 Mod. 271), it was greatly insisted upon that, though the party neglected to plead to the jurisdiction, yet the matter arising out of the inferior jurisdiction, the superior Courts ought to grant a prohibition ; for that otherwise the parties, their counsel and attornies, would give a jurisdiction to inferior Courts which they were not entitled to by law. But it was otherwise adjudged in this case ; and it seems to be now agreed that, after admitting the jurisdiction, or after imparlance, the party cannot apply for a prohibition.”—*Bacon’s Abridgement*, Prohibition (K.).

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#### *Illustrations.*

Certain objections were taken by applicant in the Small Debts Court to the jurisdiction, but no objection was taken on the ground that applicant did not reside within the jurisdiction of the Court, and no evidence was given on that point ; the Court found for the plaintiff, and on motion for a prohibition it was urged that the objection to jurisdiction was not patent on the face of the record, and therefore should have been taken in the Court below. *Darley, C.J.* : “ I am of opinion that the preliminary objection must prevail ; *Ex parte Henderson* (7 W.N. 7) is precisely in point. Here there is nothing to show want of jurisdiction, either on the record or on the evidence, nor was objec-

tion taken to the jurisdiction on this ground. In fact there was nothing in any way before the Court to show that defendant did not live within the jurisdiction" : *Ex parte Rowland* (12 W.N. 79).

It appeared that in December, 1897, a municipal council obtained judgment against A., an employee in the Railway Department. On 1st April, 1898, the complainant obtained an order *nisi* attaching moneys due to A. in the hands of the Railway Commissioner. This was duly served on the same day and was made absolute by a Court of Petty Sessions on 7th April, the Commissioner not appearing. Upon 26th July, the Commissioner obtained an order *nisi* to prohibit the enforcing of this order, on the ground that the Court of Petty Sessions had no jurisdiction, inasmuch as the Commissioner was not resident within the local jurisdiction of that Court. No excuse was furnished explaining the reason of the delay in taking out the order for prohibition, and upon objection taken, it was held that the applicant having been guilty of delay, the Court should refuse to interpose and the order *nisi* should be discharged. *Hodges, J.*, said : " The common law prohibition is one of those extraordinary remedies which, although one of right, is not one granted of course, the Court having a discretion as to whether or not it will grant it. I do not mean to say that the Court has a discretion to do what it pleases, and to refuse the order or not, as it pleases, without reason. It gives the Court jurisdiction to say whether, under the circumstances, the interests of justice will be served by the issue or refusal of the writ." His Honour then cited from *Mayor of London v. Cox* (L.R. 2 H.L. 239, at 282), and continued : " Now in this case the error of the excess of jurisdiction does not appear on the face of these proceedings ; it depends upon the fact that the Commissioner or corporation does not reside within the local jurisdiction of the particular Court of Petty Sessions which had to determine the question. It depends upon a fact which was within the knowledge of the applicant for this writ, and he has thought proper, without excuse, to allow the Court to proceed to judgment without setting up the objection. He not only did not raise it, but he did not take the trouble to appear at the hearing, but allowed judgment to go by default, as if the proceedings were all right, and admitting that the money was due from him to the judgment debtor. I shall, therefore, for this reason, discharge the order" : *Mayor, &c., of Bendigo v. Craven* ; *Ex parte The Victorian Railways Commissioner* (24 V.L.R. 173).

Where it doth appear by the libel, or by the proceedings in the cause, that the conusance of the cause doth not belong to the spiritual Court, a prohibition may be moved and granted after sentence ; and this holds in all cases but where one is sued out of his diocese ; for

there, if he doth not take advantage of it before sentence, he shall not have prohibition after sentence; *ratio est* because the cause doth belong to the spiritual Court; and though it doth not belong to that spiritual Court, it belongs to some other, and not to the King's Temporal Court: *Gardner v. Booth* (2 Salk. 548).

Where the (Chancery) Court had granted a prohibition . . . upon an affidavit that the matter arose out of the jurisdiction, it appearing at another day that the defendant had imparled generally (which admitted the jurisdiction), and so could not afterwards be admitted to plead a foreign plea, the Court granted a supersedeas to the writ of prohibition: *Anon.* (1 P. Wms. 476).

Spleen, the churchwarden of D., libelled in the spiritual Court against Vanaere, for not repairing part of the church wall, wherein he set forth that Vanaere was seised of such a manor, &c., and that the lords thereof for the time being, were by custom immemorial, bound to repair that part of the wall *ratione tenuræ*; Vanaere denied the custom in that Court, and sentence was given against him; whereupon he moved B.R. for a prohibition, suggesting the statute 23 H. 8; and that he was cited out of his proper diocese, &c., intending, therefore, that all was void and *coram non judice*, but the prohibition was denied, because Vanaere, by pleading to the libel, had admitted the jurisdiction of the Court, and the statute 23 H. 8, doth not take away the jurisdiction of all matters arising out of the diocese, but only gives him a new privilege of pleading to the jurisdiction, which benefit of pleading, if neglected, and the party suffers a sentence to be given against him there, the said statute will not serve him for a prohibition afterwards to that Court whose jurisdiction he hath already admitted: *Vanaere v. Spleen* (Carth. 33).

A prohibition was sought against a Court of Petty Sessions, on the ground that applicant did not reside in the district of the Court, and had not promised to pay there; it was objected that the application came too late after judgment, but the objection was overruled, though *Innes, J.*, said: "The applicant knew the case was coming on at Windsor, and it does not seem altogether equitable that he should have allowed it to go by default of appearance, and now move for a prohibition": *Ex parte Slate* (7 W.N. 96).

*Stephen, J.*, held that a defendant is not bound either to send an affidavit of non-residence or to appear before the Court at all, where he is summoned to a District Court out of whose jurisdiction he resides. *G. B. Simpson, J.*, thought it safer to send the affidavit, otherwise he might be bound by acquiescence. *Pring, J.*, agreed with *Stephen*.

J., and expressly dissented from the passage in the judgment of *Innes, J.*, in *Ex parte Slate* (7 W.N. 96), "it does not seem altogether equitable, &c." : *Ex parte Atkinson* (3 S.R. 314 ; 20 W.N. 82). Cf. *Mayor, &c., of London v. Cox* (L.R. 2 E. & I. at 284). See now 1905 No. 22, secs. 24, 25.

Where the defendant was served with a summons issued out of the District Court of a district in which he did not reside, *held* that he had not waived the objection by sending to the Registrar an affidavit of non-residence—that is a mere protest, and not evidence given by him in support of his objection to the jurisdiction : *Ex parte Baillie* (5 S.C.R. 17).

The Marquis of Donegal instituted a suit for nullity of marriage against the Marchioness in a Consistorial Court, the writ of summons describing her as resident at a place within the jurisdiction of the Court. She appeared and pleaded to the suit without objection on the ground of non-residence. She then desired to make the heir of the Marquis a party, so that the question of her marriage might be decided in such a way that he would be bound by the judgment, and she thereupon cited the heir (Chichester), who appeared under protest, and now sought a prohibition. It was *held* that by appearing and pleading without objection, she had acquiesced in the jurisdiction, and could not afterwards rely on the fact that she did not reside within the local limits of the Court. The question then arose whether, she having waived the objection for herself, Chichester could be prejudiced from availing himself of that objection by her act. Sir *John Leach held* that, if it could be made plain that Chichester would be prejudiced by her waiver, the case might be different ; but he could see no prejudice to Chichester, and that he was bound by her submission to the jurisdiction. "The jurisdiction of the Ecclesiastical Courts does not depend on the locality of the subject ; if the jurisdiction of the Ecclesiastical Courts depended on the locality of the subject, then it is very plain that a party might be materially prejudiced from having a subject removed from one jurisdiction to another . . . It is perfectly plain that the Ecclesiastical Court has no jurisdiction with respect to the locality of the subject, but it depends entirely on the locality of the person. . . . And I, am further of opinion that Mr. Arthur Chichester, the intervening party is bound by this admission to that jurisdiction, and that he cannot be prejudiced by submission to it ; and if his interests are in any manner affected, it is to his convenience and advantage and not to his prejudice. The citation founds itself and he cannot make an objection to the jurisdiction if the parties litigant have submitted to it."—Sir *John Leach*, in *Chichester v. Donegal* (6 Mad. 400–402).

The fact that the defendant, a foreign sovereign, fails to appear to an action in the Mayor's Court, does not disentitle the garnishee against whom process of foreign attachment has issued, to apply for a writ of prohibition. He may apply either as a party aggrieved, or as a stranger : *Wadsworth v. Queen of Spain* (17 Q.B. 171).

A party had been cited to a Consistorial Court, and the writ of citation described her as resident within the jurisdiction ; she appeared and pleaded without setting up the objection of non-residence. It being urged that she had a right to retire from that admission at any time before sentence, Sir *John Leach* said : " If I had found that question concluded by authorities, whatever I might have thought of the reasons which led to that conclusion, I must have been bound by them. . . . But I am bound to say that no authority which has been cited to me to-day, at all, as I consider it, touches essentially this question, that Lady Donegal, or any other party, who, admitting the fact which gives the jurisdiction to the Court, has a right to retire from an admission of that fact at any time before sentence. No authority appears to me to go that length ; there are expressions in that case in *Carthew* (*Vanacre v. Spleen*, Carth. 33), which would be consistent with such a state of facts ; but when you come to weigh all the expressions there used, my opinion is on that case that the weight of authority is the other way, and that what the Court there means to decide is not that a party may retire at any time before sentence, but that a party can never retire who has pleaded and submitted to the jurisdiction. Taking this, therefore, as a question not prejudiced by authority, I am to consider it as a case standing on principle only. Now in a Court of law, and also in a Court of Equity, though we have not this point precisely addressed to our consideration, yet every day we have the point upon which necessarily the same principle comes to be decided ; I state without exception, as a general principle, that in Courts of Equity as well as Courts of law, a party admitting a fact which gives jurisdiction to a Court and appearing and submitting to that jurisdiction, upon general principles and upon all analogies known to us, can never recede, or, as it is called in the Scotch law, *resile* from those facts and withdraw that admission."—Sir *John Leach*, in *Chichester v. Donegal* (6 Mad. at 397–399).

A person who had been treasurer of a hospital was, upon complaint of the then treasurer, ordered by justices to deliver up a book, the property of the hospital. A prohibition was sought on the ground that complainant was not duly registered as treasurer of the hospital under Hospitals Act, 11 Vic. No. 59, but refused : sec. 4 of that Act " does not confer but restricts rights of action ; but the opposite party



may waive his advantage, and he has done so. The attention of the magistrates should have been called to the point ; we might then have possibly interfered. As it is, we decline to give effect to the objection " : *Stevenson v. Conolly* (2 S.C.R. (Q.) 84).

An action on a judgment of a superior Court was heard in the County Court, but the original record was not legally proved. " As to the objection to the reception of evidence (if it had been taken at the time) it might have prevailed. It appears that the defendant put in issue the existence of the record of the judgment mentioned in the summons and afterwards relied on a set-off. He cannot, after all this, come here for a prohibition " : *Winsor v. Dunford* (18 L.J.Q.B. 14).

On the hearing of an information under a regulation, the complainant omitted to give evidence of the regulation constituting the offence charged, but the defendant's solicitor contended that the regulations were *ultra vires*. *Held*, on motion for a prohibition, that the defendant had waived his right to object that the regulation had not been proved : *Ex parte Grogan* (23 W.N. 199).

Complainant sued in the Police Court for detention of a book, and an order was made in his favour. Defendant moved for a prohibition on the ground (*inter alia*) that the book referred to matters over the value of £50 (sec. 10 Police Act, 19 Vic. No. 24). But prohibition refused—the point was not brought to the attention of the justices : *Stevenson v. Connolly* (2 S.C.R. (Q.) 84).

It was *held* under Medical Practitioners Statute, 1865 No. 262, sec. 12, that in order to entitle a medical practitioner to recover his fees, he must prove not only his legal qualification but his registration. But where he proved the former, and no objection was taken at the proper time to want of proof of the latter, and the objection was not made a ground of the order *nisi*, the Court would not prohibit the execution of an order of justices for the amount sued for : *R. v. Shaw* ; *Ex parte Selim* (9 V.L.R.C.L. 201). [See No. 1118, sec. 12.]

Under the Local Courts Act 1904, sec. 12, the Court is to be held by a magistrate, but in case of his " illness or absence " two justices may sit. The magistrate appointed two justices to sit to hear a case on the ground that his presence was required at another Court on the following day. It was alleged that he would, by sitting late, have been enabled to dispose of the preceding cases in time to take the case in question. *Held*, however, that the magistrate was " absent," within the meaning of the section, and that the Court was properly constituted. *Parker, C.J.*, further held, that inasmuch as the defect was latent, and the applicant had not taken the point below, he was debarred by acquiescence : *Symonds v. Hawkins* (8 W.A.L.R. 70).

A. did work for B., repairing certain houses; he was in constant employ and was paid something on account each week. He sued B. in a County Court for £15 3s. 10d. for work done and materials provided, and had a verdict for £10. Three months afterwards he sued B. again for £37 15s. 1d., for work done and materials provided, and B. applied at once for a prohibition, on the ground that there was only one cause of action between them, and that the plaintiff had split his demand. But prohibition refused—*Lindley, J.*: “If such an application as this ought to have been made, it ought to have been made at an earlier stage of the proceedings. This action is brought for £37, a sum which is not in excess of the jurisdiction of the County Court. The plaintiff is not *now* splitting his demand, and in what respect, therefore, is the County Court exceeding its jurisdiction? . . . If the plaintiff is dividing his cause of action, he has done it, and it is now too late to prevent him . . .” Cf. *Kimpton v. Willey* (19 L.J.C.P. 269): *Adkin v. Friend* (38 L.T. 393).

Both in contract and in tort, where a demand is split, and two successive actions are brought in respect of an entire demand, the defendant must take the objection at the first trial. If he has contested the first action on the merits, it is too late to take the objection afterwards: *Barker v. Marks* (6 N.Z.L.R. 529).

Where an order was made under the Police Towns Act, 19 Vic. No. 24, sec. 10, to deliver up certain property and a subsequent order was made under the Police Offences Act, 1901 No. 5, sec. 32 (3), for non-compliance with the original order, the Full Court refused to prohibit the consequent order on the ground that the original order was bad, and *held* that so long as the first order was allowed to stand, the magistrate was justified in making the consequent order: *Ex parte Cosgrove* (21 W.N. 228). Cf. *Dierken v. Philpott* ([1901] 2 K.B. 380); *Ex parte Thew* (23 W.N. 122).

The plaintiff had obtained judgment in a Resident Magistrate's Court against the defendant. Upon execution levied, the defendant's brother claimed certain goods which were seized. An interpleader summons was then issued by a justice of the peace, and directed to and served on the plaintiff and the defendant only. On the day appointed for the hearing, defendant's brother appeared by counsel, and it was decided by the Resident magistrate that the goods belonged to the brother, and the plaintiff was ordered to pay costs. Subsequently counsel on both sides attended and settled the amount of costs. No objection was taken to the jurisdiction of the resident magistrate, but on a distress warrant being issued against the plaintiff for the amount of the costs, he applied for a prohibition on the ground, *inter alia*,

that the magistrate had no jurisdiction under sec. 72 Resident Magistrates' Courts Act 1867, to hear a summons issued by a justice of the peace. *Williams, J.*, said: "There is no doubt of the absolute acquiescence by the plaintiff in the jurisdiction of the inferior Court, and therefore, unless he is entitled *ex debito justitiæ*, the rule ought not to go. Where there is absolute want of jurisdiction on the face of the proceedings, then, even after judgment, and notwithstanding acquiescence, the writ will go at the instance of a party to the suit if anything remain to be done which can be prohibited. Here something does so remain. I do not, however, think that there was a want of jurisdiction." His Honour then laid down that the non-service on defendant's brother was an irregularity which was cured by appearance, and that the magistrate had jurisdiction under the section in question to hear the summons issued by the justice: *Maslin v. Casey* (N.Z.L.R. 1 S.C. 138).

Where seamen sued for wages in the Admiralty Court, alleging an agreement to pay such wages, and an order was made in their favour, the defendant applied for a prohibition on the ground that the agreement was made on land, and was by deed, and that the Admiralty had, therefore, no jurisdiction. The defendant had not set up these facts below, and Lord *Mansfield* said: "If it appears on the face of the proceedings that the Court below have no jurisdiction, a prohibition may be issued at any time, either before or after sentence, because all is a nullity: it is *coram non judice*. But where it does not appear upon the face of the proceedings, if the defendant below will lie by and suffer that Court to go on under an apparent jurisdiction (as upon a contract made at sea), it would be unreasonable that this party, who when defendant has thus lain by and concealed from the Court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause for prohibition, and obtain a prohibition upon it after all this acquiescence in the jurisdiction of the Court below": *Buggin v. Bennett* (4 Burr. 2035).

Plaintiff sued for libel in the Mayor's Court, and had a verdict for 40s. and costs. Costs were taxed, but before execution, defendant sought a prohibition on the ground that there had been no publication of the libel which would give that Court jurisdiction. The Full Court of Appeal (Lord *Esher*, M.R., *Cotton*, *Lindley*, *Bowen*, *Fry* and *Lopes*, L.J.J.) cited *Mayor of London v. Cox* (L.R. 2 H.L. at 283), and held that, the defect not being apparent on the face of the proceedings, the defendant was precluded from obtaining his prohibition by reason of his having refrained from setting up in the inferior Court facts which he then had within his knowledge: *Broad v. Perkins* (21 Q.B.D. 533).

Applicant was sued in the Small Debts Court for trespass and

removing stone from plaintiff's land. He stated in his evidence that he had a Government contract for repair of a certain road, and that he had gone on plaintiff's land in pursuance of his powers under sec. 24, Public Roads Act (4 Will. IV. No. 11), and had carried away the stone to repair the road. He did not produce his contract, or the notification of the road as a public road, or show that he did not come within the exceptions mentioned in sec. 24, and the magistrate found against him. On application for a prohibition, he proved all these facts, but *Darley*, C.J., said: "It appears to be quite clear *now* that the applicant, being a Government road contractor, was entitled to take the stone without paying for it. But I am unable to see that the magistrates came to a wrong decision upon the case, as it was presented to them, or that their decision was against natural justice. . . . I further think that this case comes within *Ex parte Hamilton* (4 S.C.R. 64), and that I could not interfere by prohibition": *Ex parte Jennett* (12 W.N. 31),

Applicant was sued in a Small Debts Court for wharfage. Plaintiffs were lessees from the municipal council of the right to collect wharfage dues, and sued applicant for 1s. Applicant contended in the Court below that the property was not such as the council could levy rates on, and the evidence showed that it was a Government wharf. An affidavit in reply by plaintiff's solicitor, stated that before evidence was gone into, the defendant's solicitor, after consultation with applicant, stated that he did not intend to object to the jurisdiction. On motion for a prohibition, on the ground of absence of jurisdiction, a preliminary objection was taken that the points set out in the grounds of the rule were not expressly taken in the Court below. *Darley*, C.J.: "I am of opinion that the preliminary objection must prevail . . . The want of jurisdiction does not appear on the face of any of the proceedings in the Court below. The Court below is a Court of Record, and on looking at the record, which is now before us, we find that the action was brought by one person against another for wharfage, and the case may be placed in just the same position as an action upon a money count. Then the record shows that there was a judgment for the amount claimed, but discloses no want of jurisdiction in the magistrate. Even if it appeared that the plaintiff was not the lessee of the wharf, that would not show a want of jurisdiction. Nor does the want of jurisdiction appear upon the evidence that was given in the case. It appears that when the case was called on, the attorney for the plaintiff asked the defendant's attorney whether he objected to the jurisdiction of the Court, and after consulting his client, the defendant's attorney said that he did not, after which he pleaded never indebted. The case then proceeded, and the magistrate—there being nothing before him



to show that he was acting without, or in excess of his jurisdiction—found a verdict for what he thought was due. We are now asked, *upon collateral facts shown by affidavits*, to say that there was no jurisdiction in the inferior Court. It seems to me that since the judgment of *Mansfield, C.J.*, in *Buggin v. Bennett* (4 Burr. 2035) it has never been doubted that where a party has acquiesced in the exercise of jurisdiction by the inferior Court, and there is nothing on the face of the record to show a want of jurisdiction, he cannot, after judgment against him, come to the superior Court and take the objection by disclosing facts which he kept concealed from the inferior Court. The effect of *acquiescence* is thus stated in Shortt 446 : ‘Acquiescence in the jurisdiction exercised by the subordinate tribunal will not disentitle the party acquiescing to a prohibition, where it is apparent on the face of the proceedings that that tribunal had not jurisdiction ; in other words, where the defect of jurisdiction is patent. But if the want of jurisdiction does not appear on the face of the proceedings—in other words, if the defect of jurisdiction is latent, then acquiescence will preclude the party who acquiesced from showing such want of jurisdiction *aliunde*.’ Where the want of jurisdiction does not appear on the face of the record, this Court may, as in *McSwan’s Case*, look at the evidence to see if that discloses any want of jurisdiction, or an acquiescence on the part of the applicant. In this case neither the record nor the evidence show any want of jurisdiction in the magistrates, but on the other hand the evidence discloses in the clearest way the entire acquiescence of the applicant. I am, therefore, of opinion that he cannot now obtain a prohibition upon grounds that he did not see fit to disclose to the magistrate.” *Stephen, J.* : “*In Ex parte McSwan*, this Court must be taken to have held that on the evidence the objection was sufficiently taken below” : *Ex parte Henderson* (7 W.N. 7).

“ . . . It has never been decided that fresh facts can be made a ground for prohibition, when those facts were in the mind of the person applying and had never been brought before the Court below.”—*Burnside, J.*, in *Moderana v. Backhouse* (7 W.A.L.R. 39).

A summons in a Magistrate’s Court was served on M., on 11th May, but no date of hearing was mentioned ; another summons was served on 30th June, directing M. to appear on 1st July. M. appeared on 1st July, and upon judgment against him, moved for a prohibition on the ground that sec. 33 Resident Magistrates Act had not been complied with. *Gillies, J.* : “The head note in *Gregg v. Krull* (1 N.Z. Jur. 132) is not borne out by the judgment. It is, moreover, distinguishable from the present case. In *Gregg v. Krull*, there was no appearance of defendant, whereas here defendant has appeared. He thereby



waived any objection upon the ground of insufficient service of the summons. In the different proceedings in an action, the appearance of a party always supersedes any necessity for proving service of a notice. In the present case I am satisfied the appearance of the defendant was quite sufficient to give the Resident Magistrate jurisdiction": *Mear v. Bishop & Andrews* (N.Z.L.R. 6 S.C. 299).

A. sued B. in the Local Court at Mt. Malcolm. B. resided and carried on business at Mt. Morgan. The summons was not issued "by leave of the Court," but B. appeared and gave evidence, judgment passing for A. B. then moved for a prohibition, which was refused by a Judge in Chambers on the ground that B. had waived his objection to jurisdiction by appearing. *Stone*, C.J., and *Parker*, J., dismissed an appeal. It was urged that the want of jurisdiction was apparent on the face of the proceedings—but the defendant had merely asked the magistrate "in a casual way" if he had jurisdiction; but there was nothing on the face of the proceedings to show any want of jurisdiction, and the Court considered the case covered by *Moore v. Gamgee* (25 Q.B.D. 244), and refused a prohibition on the ground that the applicant had waived the objection: *Davis v. Burt & The Malcolm Brewing Co.* (5 W.A.L.R. 76).

A judgment summons was issued under the Imprisonment for Debt Abolition Act 1874, without an order of the Court, although the summons was headed "Issued by leave of the Court." Held that the applicant had not by appearing to the summons waived his objection to the jurisdiction: *Kirkcaldie v. Cave* (N.Z.L.R. 3 S.C. 299).

An interpleader summons was signed by the Registrar—the words "For the Court," did not appear, though in fact, an order had been made by the Court. *Owen*, J.: "That which was irregular was the mode in which the officers of the Court carried out that direction, and, when served, it was open to the applicant, either to disregard the summons altogether, and treat it as waste paper, or to appear and take the objection. The applicant took neither course. He appeared, and without taking any objection to the manner in which he had been brought before the Court, he permitted the Court to enquire into and adjudicate upon the question in dispute. The matter which was before the Court was clearly within its jurisdiction, and in my opinion the applicant waived his right to take the present objection": *Ex parte Prior* (20 N.S.W.R. 72).

A summons from a Magistrate's Court was served on M., fixing 16th March as the date of hearing, but the hour at which his attendance was required was left blank and the cost of the summons was not inserted. The signature of the magistrate appeared on the summons

under the words "To be served by the plaintiff or his agent," but it was not otherwise signed by him, nor was it signed by the Clerk of the Court. M. telegraphed to the magistrate that he could not attend in "consequence of distance," and asking for an adjournment. The magistrate gave judgment for the plaintiff with costs in M.'s absence. On 23rd March, M. applied for and obtained a rehearing upon conditions with which he did not comply, and no rehearing took place. A prohibition against the judgment of 16th March was refused. *Gillies, J.*, said that the summons was irregular and not a nullity, and that M. had taken the proper step in applying for a rehearing, "and this rehearing being granted, he waived the previous irregularity by not availing himself of the rehearing thus granted": *Medo v. Clendon & Loram* (6 N.Z.L.R. 720).

Applicant had been ordered to pay a certain sum to complainant under the Infants' Protection Act, 1904 No. 27. On motion for a prohibition, *Pring, J.*, said: "It is the duty of the magistrate to see before he issues the summons, that there is corroborative evidence. But if he issues a summons on insufficient evidence, I think the defendant can move for a prohibition at once, and that that is his proper course. If he does not do that, all that the other magistrate has to do under sec. 9, is to hear the complaint. I do not think he has to embark on an inquiry as to whether the summons has been properly issued. The defendant being there before him, it is his duty to hear the complaint. On the return day of the summons in this case, the present applicant appeared before the magistrate and, according to the depositions, by an arrangement between the parties, the matter was adjourned for a fortnight. The defendant was there represented by an attorney, and pleaded cause to show. So that, even if he had any right to object to the summons, the applicant, by pleading to the information, waived any question of jurisdiction. It is true the point was taken afterwards, but it was then too late": *Ex parte Jackson* (22 W.N. 30).

Plaintiffs sued defendant in a County Court within the district of which defendant had carried on business within six months before action commenced, but did not dwell or carry on business at the time of action commenced; leave to sue in that Court had not been obtained (sec. 74 of 51 & 52 Vic. c. 43). Defendant appeared and the case was heard and partly determined and adjourned to a future day. At the resumed hearing, the defendant for the first time took objection to the jurisdiction on the ground that he did not reside within the district, and that the leave required had not been obtained, but the Judge held that he had waived the objection. A prohibition was refused: this was a case in which under certain circumstances (*scil.* the obtaining of

leave), the Court had jurisdiction and, therefore, the defendant could waive the objection, and had in fact done so. *In re Jones v. James* (19 L.J.Q.B. 257) followed: *Moore v. Gamgee* (25 Q.B.D. 244).

The Judge of the County Court made an order giving leave to serve a plaint on a defendant out of the jurisdiction. "Assuming, therefore, that the order be of doubtful validity, I am of opinion that by coming in and pleading the defendant has deprived himself of the power of examining minutely into the regularity of that process by which he was called upon to appear and that as against him it must be considered as perfectly valid." Rule discharged: *Jones v. James* (19 L.J.Q.B. 257).

"I have already held, and I see no sufficient reason to alter my opinion, that, although the Duke of Devonshire did seek the judgment of a Court of law, his seeking it is no bar to his claim for a prohibition; if, on other grounds, he is entitled to it, and if the judgment which he so invoked is not of such force and finality as, of itself, to nullify the jurisdiction of this tribunal. In support of this view, I referred to *Adriel Mill's Case* (Skin. 299); *White v. Steele* (12 C.B.N.S. 383); and *Burder v. Veley* (12 A. & E. 263) as showing that the ineffectual exercise of the right of appeal does not, in a fit case, forbid a prohibition, this remedy being cumulative, and failure before one Court being no sufficient bar to access to another. In further support of it, I may also refer to the exposition of the law in Lloyd on Prohibition, p. 14, and the observations of Mr. Justice Willes in *The Mayor of London v. Cox* (L.R. 2 H.L. 239), with reference to the duty of interference where there has been a want of jurisdiction."—Lord O'Hagan, in *Devonshire v. Foot* (Ir. R. 5 Eq. at 318).

Where the applicant had appealed unsuccessfully against a decision and then applied for a prohibition on some of the grounds on which he had appealed (the appeal having been dismissed on the ground that the appellant had mistaken his remedy), a prohibition was refused to the applicant by reason of his "conduct in resorting to other proceedings when if right in his law he had a plain course open to him": *Ex parte Sherlock* (16 W.N. 94).

Hutchins sued Full in a spiritual Court for tithes, and Full set up a modus and several customs: the Court heard evidence on these issues, and found against the customs. Full now sought prohibition on the ground that the Court had no jurisdiction to try customs, and that, as the defect appeared on the face of the proceedings, he was entitled to prohibition. But prohibition was refused—the defendant himself alleged the custom and submitted to trial, and there was no

reason why he should have a prohibition to save himself from the costs in the Court below : *Full v. Hutchins* (2 Cowp. 424).

An appeal was set down for hearing before a District Judge on 15th April, but the case on appeal was not filed till 18th May. On 15th April, appellant applied for an adjournment of the hearing, and the Judge intimated that he must grant an adjournment as there was nothing then before him. The respondent then stated that he was prepared to argue the matter and that he had objections to the appeal that were fatal, and asked for costs of the day. The Judge, who pointed out that he had nothing before him, granted an adjournment and reserved the question of costs. The respondent now applied for a prohibition, on the ground that the Judge had no jurisdiction to hear the appeal. It was objected that, as he had submitted to the adjournment and asked for costs, he had waived his objection to the jurisdiction. But it was held that there was not in fact any waiver—there was no intention to waive the objection, and nothing was in fact done to mislead either the Judge or the appellant : *Slate River Sluicing Co, Ltd. v. Robinson* (6 N.Z. Gaz. L.R. 74).

The claim before a resident magistrate was for £176, of which £76 was abandoned by the plaintiff to bring the case within the jurisdiction. When the case came on for hearing, defendant said he was embarrassed by not knowing on what items of account the £76 had been abandoned. Counsel for the plaintiff then asked leave to amend by striking out an item of £100, which was done, and the case was adjourned by consent. At the hearing, defendant asked for judgment, as £76 had been abandoned and £100 struck out, and there was thus nothing to recover on. On verdict for plaintiff for £76, defendant applied for a prohibition, but *Prendergast, C.J.* : “ It was competent for the plaintiff’s solicitor to have given no evidence of the item of £100, but to have proved the item for £76. These were always within the jurisdiction of the Court, and were never taken out. The conduct of the defendant’s solicitor precludes him from taking an objection to the jurisdiction now; he must be considered to have assented to the adjournment of the case after the rearrangement of the particulars. It would be most unfair if the defendant were now allowed to raise the objection. It would be deceiving the Court and deceiving the plaintiff ” : *Re Broad ; Harper v. Conway* (N.Z.L.R. 1 S.C. 79).

Defendant was sued for £475 in the Mayor’s Court ; he entered an appearance, not under protest, and applied for particulars of the cause of action, and subsequently made a further application with respect to plaintiff’s right of discovery, but he had not pleaded. He now sought



a prohibition on the ground that the whole cause of action, on the plaintiff's own showing, had not arisen within the jurisdiction. It was urged that defendant had waived the objection by the above steps, but *held* that he had merely taken the steps to find out the precise nature of the claim against him, and that he was entitled to move for a prohibition as soon as he knew what the claim was: *Lee v. Cohen* (71 L.T. 824).

The Native Land Court proceeded to partition land amongst various owners under the Native Land Laws Act and Amendment Acts. Upon the application being made to the Court, adjournments were granted from time to time to enable a scheme of arrangement to be made and the Court then received evidence from leading natives that the arrangement was fair, and made a partition in accordance with it. Objections to the scheme had been called for, but none had been made. Upon motion for a prohibition on the ground that the Native Land Court had no jurisdiction to sanction an arrangement which had not been reduced to writing, the Court *held* that the Native Land Court had jurisdiction. *Prendergast*, C.J., said: "I do not think that this kind of action is a representative action. I think that counsel for the plaintiffs have therefore been introducing from a different class of cases an idea which has no application to a case of this kind. I think that each individual should move on his own account. The conduct of one party may entirely preclude him from asking for a prohibition, although it may be open to others to do so; and the inconvenience of treating such an action as a representative action is evidenced when we come to consider questions of conduct. But in what I have said I have assumed that these plaintiffs represent other persons who are not now plaintiffs, and who were perhaps not present or represented, when the matters complained of took place. The Court having had jurisdiction to do what it did, irrespective of consent, I think that all the natives interested are bound, and that there could be no prohibition, even if all those alleged to have been injured were plaintiffs. On the other assumption, however, that the plaintiffs represent themselves only, there is the further consideration that they had the opportunity of objecting to what was being done, and did not choose to do so. . . . They cannot now come forward and say that the Court had no right to deal with the matter as it did. They allowed the Court to proceed on the assumption that they assented to the mode of dealing with the matter which was adopted, and they cannot now be allowed to come forward and say that there was no jurisdiction to so deal with it. I think that on this ground also, the writ must be refused." *Richmond*, J., concurred: *Pohuka Hapuku v. Smith* (12 N.Z.L.R. 155). Cf.



*Chichester v. Donegal* (6 Mad. 400-402); *Wadsworth v. Queen of Spain* (17 Q.B. 171).

*Griffith*, C.J.: "I say it is doubtful whether the rule in *Broad v. Perkins* should be held to be applicable to objections to the jurisdiction of the Commonwealth Court of Conciliation and Arbitration, if it clearly appeared that it had no jurisdiction. But in any circumstances, that rule ought not to apply where the Court asserts the right to go beyond the matters in which the parties were willing to submit themselves to the jurisdiction and which were in the minds of the parties when they made the submission": *R. v. Commonwealth Court of Conciliation, &c.* (8 C.L.R. 419; 15 A.L.R. 416).

It was *held* that where a summons under Justices of the Peace Statute 1865, sec. 41, is issued for a debt over £20, the complainant does not bring the matter within the jurisdiction of justices by allowing credit in his particulars for a cross claim, to the amount of which the defendant does not agree—although he has entered a defence of set-off in respect of that very item: *R. v. Panton*; *Ex parte Wilson* (6 V.L.R. C.L. 33). [See now No. 1105, sec. 59.]

It was *held* that a copy of the original order for payment must be served upon the defendant before the issue of a fraud summons, otherwise there will be no foundation for the exercise of the jurisdiction under Act No. 284. This enactment being of a penal character, objections for want of such service are not waived by part payment under the original order: *R. v. Cookson*; *Ex parte Collins* (9 V.L.R.C.L. 23.) [Cf. Act No. 1100.]

Where the Consistory Court, on the hearing of exceptions to an executor's inventory, heard evidence *viva voce* (which they had no jurisdiction to do), *held* that the executor, by applying to amend the inventory, did not waive the objection to the hearing of evidence: *Griffiths v. Anthony* (5 A. & E. 623).

A garnishee does not, by pleading *nul habet* in process of foreign attachment, disentitle himself to a prohibition on the ground that the Mayor's Court has no jurisdiction to entertain an action against a foreign sovereign: *Wadsworth v. Queen of Spain* (17 Q.B. 171).

By the County Courts Act 1888, sec. 65, where in any action of contract brought in the High Court the claim endorsed on the writ does not exceed £100, or where such claim, though it originally exceeded £100, is reduced by payment, or admitted set-off, or otherwise, to a sum not exceeding £100, an order may be made for the trial of an action in the County Court. A master made an order remitting the action to the County Court, where the writ claimed over £100, the plaintiff having abandoned the excess at the hearing before the Master. The defendant did not appeal against this order, but objected to the juris-

diction of the County Court Judge, and now sought a prohibition. It was held that the order by the Master was wrongly made, the excess not having been abandoned before the issue of the writ in the High Court; but a prohibition was refused—the County Court Judge had the Master's order before him, and there was no excess of jurisdiction “when the matter was before the County Court Judge,” and the Court, therefore, had a discretion to refuse the writ, and did refuse it, because the defendant did not avail himself of the opportunity which he had of appealing against the Master's order: *Dierken v. Philpot* ([1901] 2 K.B. 380). Cf. *Ex parte Cosgrove* (21 W.N. 228); *Ex parte Thew* (23 W.N. 122).

To an action in the High Court on an award, the defendant pleaded a counterclaim containing items for unliquidated amounts. After joinder of issue, the cause was by consent remitted to the County Court, where the defendant objected that the order remitting the cause was made without jurisdiction, since only actions involving liquidated amounts could be remitted. *Hannen, J.*: “In this case the order remitting the case was made by consent . . . . The case of *Jones v. Jones* (19 L.J.Q.B. 257) seems to me to be directly in point. There, *Erle, J.*, decided that the defendant, by once appearing before the County Court Judge, had waived the right of examining into the regularity of the process by which he had been summoned to appear, and that a subsequent application by such defendant for a writ of prohibition to prevent the Judge of the County Court from proceeding in such suit must be refused. That case applies here.” *Mathew, J.*, concurred. Rule discharged with costs: *Mouflet v. Washburn* (54 L.T.N.S. 16).

If the superior Courts have jurisdiction to restrain the proceedings of inferior Courts, there must of necessity and common sense be some power to restrain the inferior Courts from proceeding upon a sentence passed when the superior Courts are not sitting, and when no application can be made to them; otherwise they might commit any injustice, however great, and could not be stopped or prevented from doing so: *Roberts v. Humby* (3 M. & W. 120).

A license was granted by a Licensing Court on the 16th January, and a rule *nisi* for prohibition on 22nd February. *Held*, not sufficient delay to disentitle applicant to a prohibition. *Windeyer, J.*: “A number of persons have probably had to be consulted as to the course to be pursued, and I really do not see that there has been any extraordinary delay, nor has it been shown that the respondent has been inveigled by the delay into commencing the erection of his hotel, or that he has been put to any loss.” But *Innes, J.*, though concurring,

said : " But I have not been able entirely to rid myself of the doubt I entertained during the case as to the applicant having been guilty of unnecessary delay. For my part, I do not think that in matters of this kind, there should be a delay of five or six weeks in coming to the Court, and on that ground I think the applicant ought to be deprived of his costs " : *In re Scadden* (16 N.S.W.R. 125).

" It seems to us that on all the points he might have applied for a prohibition as soon as he pleased after the 1st March. Instead of that, he chose to resort to another tribunal, and take proceedings by way of appeal. He causes the opponent to be summoned ; he invites the jurisdiction of the Court, raises the identical questions on which he now relies, and further endeavours to obtain a decision of the Court on the merits. A decision is given against him, his appeal is dismissed with costs on 14th April, and on 19th July he obtains a rule *nisi* on some of the very grounds that had been submitted to the Court of Appeal and decided by it to be insufficient—holding that in respect thereof, the applicant had mistaken his remedy. It may be that portion of the delay to apply for a rule *nisi* for a prohibition can be accounted for, so far as to relieve the solicitor from any blame. But the prejudice to the other side by reason of delay remains the same " : *Ex parte Sherlock* (16 W.N. 94).

A verdict went against applicant in the Small Debts Court, though he did not reside in the district of that Court, or promise to pay in that place. *Innes, J.* : " We think that the application should be dismissed, on the ground that the applicant was guilty of unreasonable delay in applying to the Court. Judgment was signed on 4th April, execution issued and a bailiff put in on 12th April, and it is not until ten days after that, and after a claim has been made by a third party to the goods, that he makes this application to the Court. Under these circumstances, I am of opinion that he has delayed too long, and therefore that this application should be dismissed with costs." His Honour referred to *Ex parte Broughton* (Knox 189). *Stephen and Foster, JJ.*, concurred : *Ex parte Lenehan* (9 W.N. 196).

Applicant owned a station in G. district, and stayed there from time to time. He also had a residence in Sydney. He was sued in G. District Court on 1st February. Objection was taken to the jurisdiction on the ground of non-residence, and the case postponed till 19th June, to enable B. to apply to the Supreme Court. B. obtained a rule *nisi* on 11th June, returnable 19th June. *Martin, C.J.*, thought there was nothing in the point taken as to delay, and referring to *Turner v. Nicholson*, pointed out that that case applied where a prohibition was asked for after judgment. " The present application was made

while the proceeding is still going on and before judgment has been given." But *Hargrave* and *Faucett*, JJ., took a contrary view. *Hargrave*, J. : " . . . I think that the universal rule which holds in all proceedings, and is not confined to Equity, viz., that a person seeking relief must come within a reasonable time, applies here. The delay would be a sufficient ground, to my mind, for refusing the prohibition. Besides, I should also be inclined to refuse it on the ground that there had been a concealment in not stating to the Court upon the application being made, that this delay had occurred. It is a general rule that when a rule *nisi* is obtained *ex parte*, any omission to state all the material facts to the Court is fatal when the rule comes on to be heard." And *Faucett*, J. : " I am of opinion that delay in these cases is very important, and that where a party lies by, the Court ought not to interfere. Here the defendant had an opportunity of coming to this Court months ago, and yet he does not make his application until it may have the effect of putting off the proceedings in the District Court for another six months. I think the plaintiff ought not to be put in that position. It seems to me that Mr. *Salomons*' contention is a right one, and that where the objection to the jurisdiction is a personal matter, as in this case, the question of delay becomes important. A person who only objects, and takes no steps to put a stop to the proceedings within a reasonable time, ought to be taken to have submitted to the jurisdiction. No doubt where there is a question whether the inferior Court has jurisdiction over the subject matter it is a different question. There, delay is of no consequence. I am quite content to rest my decision on the ground that the defendant here was guilty of unreasonable delay in applying to the Court. I am also satisfied that there was a concealment of material facts, though I am sure it was accidental and unintentional " : *Ex parte Broughton* (Knox 189).

Defendant, after judgment in a District Court against him, applied for prohibition, on the ground of non-residence within the district in which he was sued. *Faucett*, J. : " But the question still is, are we obliged to act after such a lapse of time, and with a view to the conduct of the defendant ? In the first place he instructs an attorney to have the case postponed. It comes on and is continued to the next sitting of the Court. He is aware of all these steps, yet he allows June and September, and the greater part of the December terms to pass without doing anything. . . . It seems to me that if he takes this proceeding he ought to take it in time ; and that he ought not to allow the plaintiffs in the Court below to go on and incur expense in obtaining judgment." Sir *W. Manning* gave judgment to the same effect : *Ex parte McEvoy* (2 S.C.R.N.S. 67).

Where between the making of an order and the application for a rule *nisi* the long vacation intervened, the applicant company carried on its business in Adelaide, the company's solicitor carried on business at Broken Hill, and counsel's opinion had to be obtained from Sydney. *held* that an application for a rule *nisi* for a prohibition made in April against an order made in December of the previous year, was not too late : *Ex parte South Australian Brewing Co.* (8 S.R. 361).

Sec. 122, County Courts Act (9 & 10 Vic. c. 95) contemplates those cases only in which the ordinary relation of landlord and tenant exists ; therefore, where the party suing under that section claimed as mortgagee of the premises, and there was no sufficient evidence that the defendant, who was tenant of the mortgagor, had consented to hold under the mortgagee, or was even aware of the existence of a mortgage, the Court granted a prohibition. "It is said, however, that the defendant is too late in making this application. But it appears that the case was only heard before the Judge of the County Court on 27th May, the affidavits were sworn on 1st June, and the rule obtained on the 5th, before the warrant of possession was executed, although the bailiff had no notice of the rule till the 7th June, the day following the execution. I think that the defendant came as soon as he reasonably could " *Jones v. Owen* (5 D. & L. 669).

A licensing committee granted a renewal certificate, but annexed a condition which they had no jurisdiction to impose. The applicant took out the certificate and acted on it. "I do not see that the applicant having acted on the certificate should prejudice his right to a prohibition. He objected to its issue with the condition attached ; he had no choice but to take it in that form or go without it. He might, perhaps, have applied for a mandamus to have the license issued without the condition, but he had in the meantime to have a license to carry on his house " : *Whittle v. Bishop* (13 N.Z.L.R. 670).

It was resolved *per totam curiam* that if one be sued in the Admiralty Court for a thing alleged to be done upon the high seas, within the jurisdiction of the Admiral, and the defendant plead to it and confess the thing to be done, and after sentence is given the Court will be advised to grant a prohibition upon surmise that it was done *infra corpus comitatus* against their own confession, unless it can be made to appear to the Court, by any matter in writing, or other good matter, that this was done upon the land, for otherwise everyone will stay until after sentence, and then for vexation only sue out a prohibition ; for although the admittance of the party cannot give jurisdiction to the Court, where it of right hath none, for that it will be an encroachment upon the Common Law ; yet, when the Court shall be advised that it is



merely for vexation, and shall be intended for delay, if the prohibition shall not be sued forth till after sentence; unless that he can show good matter to the Court to ascertain the Court that this is not for vexation, it shall not be granted. And admonition was given to them which sue forth prohibitions, that they should not keep them by long time in their hands, and notwithstanding proceed in the Ecclesiastical Courts, &c. And when they perceive that they cannot prevail, then to cast on their prohibitions; for if they abuse that liberty to the damage and vexation of the party, we will take such order as in the writ of privilege; if the defendant keep it until the jurors are ready. &c., it shall not be allowed: *Admiralty* (12 Rep. 77).

*Willes, J.*, points out that where the defect is not apparent, the party loses his right to a prohibition by lying by—"except, perhaps, upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant: see *Case of The Admiralty*": *Mayor, &c., of London v. Cox* (L.R. 2 E. & I. at 283).

By the Public Worship Act 1874 (37 & 38 Vic. c. 85), certain provisions were made for the hearing of representations made to a bishop as to illegal acts of an incumbent within his diocese, but it was further enacted that if the bishop should be patron of the benefice held by the incumbent against whom the representation was made, he should not act in the matter. A representation was made against D. to the bishop of his diocese, who in fact had the right of patronage of the living held by D., and was by him transmitted to the archbishop, who required the Judge to hear it. The Judge heard the matter and gave judgment against D., who had notice of the proceedings, but did not attend. A monition and subsequently an inhibition issued against D., and his benefice was sequestered. D. did not know that the patronage of the living was in the bishop (it having been transferred to him from another body which previously held it) until after the sentence had been given and the monition issued. After the sequestration, and nine months after the sentence, he applied for a prohibition. A prohibition was granted—the bishop had to exercise certain judicial functions before invoking the jurisdiction of the Court, and his interest disqualified him from acting in the matter, and so rendered void the initiatory proceedings necessary to give the Court jurisdiction. "Is the applicant then too late to apply for a remedy which the common law gives him, and which he undoubtedly would have been entitled to had he made the application before sentence? None of the authorities brought before us, when analysed and examined, appear to us to support the proposition; and seeing that the sentence is still in operation, and that if not

stayed it will, or may, end in deprivation, we can see no reason for limiting the right to a prohibition to that stage of the cause. The applicant has neither acquiesced in the jurisdiction assumed by the Court, nor done anything to stop himself from complaining of it. He did not even know of the fact which creates the disqualification until after sentence had been given. We should require strong and explicit authority to fortify us in assenting to a proposition so repugnant to common sense and justice as that a person should be shut out from the benefit of an objection because he did not make it before he became aware of the existence of the facts which raise it. We can find none. We need not go through the cases. They are classified and explained in the elaborate opinion of the Judges delivered by the late Mr. Justice Willes, in the House of Lords in *Mayor, &c., of London v. Cox* (L.R. 2 H.L. 239), and so much of that opinion as bears upon the present question fortifies us in the view we have taken.”—*Mellor and Lush, JJ.*, in *Serjeant v. Dale* (2 Q.B.D. 558).

“The proposition stated in the judgment of the Court of King’s Bench in *Ex parte Cowan* (3 B. & A. 129), that ‘it is a settled rule that you cannot apply for a prohibition after judgment unless there be an original want of jurisdiction apparent upon the face of the proceedings’ is no doubt, too broadly stated”: *Jessel, M.R.* His Lordship then cites *Mayor of London v. Cox* (L.R. 2 H.L. 283): “Mr. De la Bere does not come within the principle of the exceptions so defined. He has not an irresistible case, or any excuse for the delay. . . . This case, therefore, does not fall within the exception which was allowed in *Serjeant v. Dale* (2 Q.B.D. 558), where it was held that Mr. Dale was excused from the delay in asking for the writ on the ground of his ignorance of an objection, which did not appear on the face of the proceedings. Nor does it fall within the exception mentioned in the case of *The Admiralty*, the principle of which is that the prohibiting Court will grant the writ where ‘it appears by any matter in writing or other good matter’ that the Court sought to be prohibited never had any jurisdiction whatever, as, for instance, where the old Court of Admiralty tried an offence shown to be committed upon the land *infra corpus comitatus*”: *Combe v. De la Bere* (22 C.D. at 324–326).

A complaint made by an inspector of nuisances for hindering him in his duties was heard by two justices, who were both aldermen, and a fine imposed, part of which went to the funds of the corporation. *Held*, on prohibition, that the justices were disqualified from sitting in the case. (See 1902 No. 27, sec. 19). *Stephen, C.J.*: “A magistrate should always enquire in cases such as the present whether the objection of his interest will be taken. If it is known, and the objection waived,

the point cannot be afterwards taken to quash the conviction": *Ex parte O'Connor* (8 S.C.R. 142).

A party can waive the common law objection of interest in the Judge: *Serjeant v. Dale* (2 Q.B.D. 358).

A District Court Judge, being a shareholder in a bank, heard a case, in which the bank was defendant. He decided against the bank, and the bank now sought a prohibition on the ground that he was a shareholder, and therefore interested. It was argued for the applicant that the fact was not known to the bank, as the Judge might have parted with his shares at any time, and for the respondent that the bank must be taken to have known its own shareholders. A prohibition was granted. *Per Stephen, C.J.*: "It is impossible to allow any case under any circumstances to be tried by a Judge who is interested in the subject matter": *Commercial Bank v. Balgarnie* (3 S.C.R. 27).

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#### B.—APPLICATION AFTER JUDGMENT IN THE INFERIOR COURT.

Prohibitions are grantable *ex debito justitiæ* as well after as before judgment or, so long as anything remains to prohibit, execution, unless the omission to move before judgment be deemed in the circumstances of any particular case to amount to delay, waiver, or acquiescence.

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"The King's Courts that may award prohibition, being informed by plaintiff or defendant, or by any stranger, that any Court, temporal or Ecclesiastical, do hold plea where they have no jurisdiction, may lawfully prohibit that Court *as well after judgment and execution as before*, and if the Judge of the inferior Court or the party proceeds, notwithstanding a prohibition, an attachment may be had against them, or an action on the case will lie against them."—Viner's Abridgement, Prohibition (A.), *note*.

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*Alderson, B.*: "It is quite clear upon the face of the proceedings that there was a want of jurisdiction. If it had not, I own I should have thought, under the circum-

stances of this case, that this Court would have had a right to interfere. I think a writ of prohibition may be granted even after execution. All the cases where it has been held otherwise will be found to have turned on the acquiescence of the party. In 2 Coke's Institute, title *Articuli Cleri* (p. 602), the objection is thus stated: 'As touching the time when prohibitions are granted, it seemeth strange to us that they are not only granted at the suit of the defendant in the Ecclesiastical Court after his answer (whereby he affirmeth the jurisdiction of the said Court, and submitteth himself unto the same), but also after all allegations and proofes made on both sides, when the cause is fully instructed and furnished for sentence; yea, after sentence; yea, after two or three sentences given and after execution of the said sentence or sentences, and when the party for his long continued disobedience is laid in prison upon the writ of *excommunicato capiendo*.' And then the answer is, 'Prohibitions by law are to be granted at any time to restrain a Court to intermeddle with or execute anything, which by law they ought not to hold plea of; and they are much mistaken that maintain the contrary.' And again, 'And the King's Courts that may award prohibitions, being informed, either by the parties themselves or by any stranger, that any Court, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same, as well after judgment and execution as before.' *Parke, B.*: "The objection to granting prohibition after judgment is entirely one of acquiescence": *Roberts v. Humby* (3 M. & W. 120).

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"It was given for a rule by *Coke, C.J.*, to which the Court agreed, that after sentence in the spiritual Court he would not grant a prohibition if there was not matter apparent within the proceedings; for he said he would

not allow the party to show anything not grounded on the sentence, because he has admitted the jurisdiction, and there is no reason for him to try if the spiritual Court will help him, and afterwards to sue for a prohibition at common law. Godb. 163 pl. 228; Pasch. 8 Jac. C.B., in the case of *Candict v. Plomer*.”—Viner’s Abridgement, Prohibition (L.), (a) (5).

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Application after execution where nothing remains to prohibit : see Chapter IX., p. 389.

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#### *Illustrations.*

Prohibition was granted upon the 23 Hen. 8 c. 9 for suing for a legacy of £10 in the Prerogative Court, whereas the parties dwelt in another diocese. But because the will was proved in the spiritual Court, and the suit in the same Court where the probate was, and there sentence given for the legacy; and afterwards an appeal upon this sentence to the delegates, where it was affirmed, and costs taxed, and excommunication upon the sentence; and in all this time, until after the sentence in the appeal, not any endeavour made to stay these suits by the said statute; therefore, having so long allowed the jurisdiction of the said Courts, he came now too late to have a prohibition. And although a prohibition was before granted, because the party had not notice to contradict it, yet the Court would not compel the party to appear and plead thereto (as is the usual course in such cases); but upon motion granted a consultation : *Smith v. Poyndrell’s Executors* (Cro. Car. 97).

And note the same day Sir John Watts, Captain Newport and others prayed a prohibition in the cases of Monsieur Villiers, Governor of Deepe, for spoil done at Cape de Vert, which they would have surmised to have been done at land at Grimly; but because it did not appear so in the libel, and because they had suffered it to proceed to sentence, it was denied and they left to their remedy upon the statute if there were cause : *Don Diego Serviento de Acuna v. Jolliff* (Hob. 78).

The Lord Chancellor had made an order in bankruptcy directing accounts between the assignee of the bankrupt and the bankrupt, but prohibition was refused : “The present application has been made to this Court after the final order of the Lord Chancellor; and it is a



settled rule that you cannot apply for a prohibition after a judgment, unless there be an original want of jurisdiction apparent on the face of the proceedings."—*Abbott, C.J.*, in *Ex parte Cowan* (3 B. & Ald. 123).

Applicant had been served with a summons to a Small Debts Court, which did not give the full period required by the rules for the return day. Judgment being entered against him for default of appearance, he applied for a prohibition. "The granting of a prohibition in a case like this is not a matter of right unless the want of jurisdiction appears on the face of the proceedings; and the rule is perfectly clear, and continuously acted upon, that in such a case, where the applicant for prohibition delays taking proceedings until after judgment or execution, when he might have taken proceedings prior thereto, with a view of staying the action, the Court will not interfere by way of prohibition. I think there are two reasons why we should not make this rule absolute: firstly, on the point as to whether the summons was properly served or not, the question is determined by *Moderana v. Backhouse*; secondly, if the summons was not properly served, and the magistrate had no jurisdiction, or exceeded his jurisdiction, this Court should not interfere because the applicant for the writ has stood by and allowed judgment to be entered and execution levied against him without any protest. Indeed, his affidavits show that he abstained from attending the Court upon the summons, or doing anything to apprise the magistrate that he was acting wrongly. He stood by and allowed judgment to be entered and execution issued. When execution was issued, he applied for the writ of prohibition. This was some four or five months after the service of the summons. In my opinion, therefore, assuming the magistrate had no jurisdiction, the action of the applicant debars the Court from granting him the remedy he asks." *McMillan, J.*, concurred: *Hill v. Betrix* (7 W.A.L.R. 116).

An action having been commenced in the Resident Magistrate's Court at Dunedin, for the price of goods sold and delivered, the defendant applied to have his evidence taken at the Resident Magistrate's Court at Oamaru, under the Resident Magistrates' Evidence Act 1872. At the hearing of the case in the former Court, no objection was taken to the jurisdiction, and judgment was given for the plaintiff. The defendant then applied for a prohibition, but *Williams, J.*, said: "No want of jurisdiction appears on the face of the proceedings, and judgment had been given by the magistrate in the case before the commencement of the proceedings to obtain a prohibition. It seems clear that if the objection to the jurisdiction does not appear on the face of the proceedings, and if the defendant allows judgment to go against him

without raising any objection, the Court will not grant the writ": *Merchinney v. Ross* (4 N.Z.J.R.N.S.S.C. 13).

A prohibition was moved for to restrain proceedings in a prosecution under the Gaming Act. "It appears from the affidavits that the proceedings complained of are not yet concluded, no formal conviction having been drawn up or fine enforced, and without giving any opinion whether this writ would lie where the party convicted was under sentence, we are of opinion that the prohibition is in time in the present instance": *Ex parte Gaynor* (Legge 1299).

Prohibition granted after seizure and before sale of goods levied upon: *McCaul v. Williamson* (1 Macassey 347).

Plaintiff brought an action of replevin in the County Court, and a prohibition was sought to prohibit further proceedings, and asking that the sum of £5 5s., the damages, and £9 9s. 8d. costs paid by the defendant should be returned to him. The costs and damages were in fact paid under protest, to save execution. A preliminary objection was made that the applicant came too late: "As there was in effect nothing to prohibit—the trial, the verdict, the judgment, and payment of damages and costs having been complete before the prohibition was moved for—and no defect of jurisdiction appeared upon the proceedings." On the other side, the case of *Roberts v. Humby* (3 M. & W. 120) was cited, to show that where the applicant for the prohibition could not have moved earlier, he is not too late after sentence and execution, though want of jurisdiction does not appear on the face of the proceedings. But *held* that without pausing to inquire what would be the effect of a prohibition where nothing remains to be done it is sufficient for the present purpose to observe "that the applicant had lost his right by having lain by and apparently acquiesced in the jurisdiction": *Yates v. Palmer* (6 D. & L. 283).

Defendant held not too late after execution to obtain a prohibition where title to land was in question: *Ex parte Lawrence* (S.M.H., 6th and 30th Sept., 1865).

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### C.—APPLICANT NOT MAKING OUT HIS RIGHT TO THE WRIT.

It lies on the applicant in every case to show in fact and in law that he is entitled to the writ; unless he discharge the onus thus cast upon him, the Court has a discretion to refuse the writ.

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"On the first point, therefore, we are of opinion that, whether the superior Court be informed by the defendant

or the plaintiff in the suit in the Court below, or by a stranger, the only discretion which the superior Court has to refuse a prohibition is, if it doubt in fact or law whether the inferior Court is exceeding its jurisdiction or is acting without jurisdiction; but if the superior Court is clear in fact and in law that the inferior Court is acting in excess of its jurisdiction, or without jurisdiction, it cannot rightly refuse to enforce public order in the administration of the law by refusing either to issue a writ of prohibition or to put the plaintiff in prohibition to declare in prohibition.”—*Brett, J., in Worthington v. Jeffries* (L.R. 10 C.P. at 383, 384).

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“Whether the application be by the defendant in the suit below, or the plaintiff or a stranger, if the Court doubt as to what is the true state of the facts, or as to the law applicable to recognised facts, it is indisputable that the Court may decline to proceed further, may refuse to prohibit or direct the plaintiff in prohibition to declare.”—*Brett, J., in Worthington v. Jeffries* (L.R. 10 C.P. 379).

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“In that case (*Foster v. Berridge*, 4 B. & S. 187), it is obvious that there was that uncertainty as to the law which has always been held to be a justification to a Court to refuse to prohibit, or to direct a declaration in prohibition.”—*Brett, J., delivering judgment of Brett, Grove and Denman, JJ., in Worthington v. Jeffries* (L.R. 10 C.P. 379).

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“The writ of prohibition, valuable as it is when kept within proper bounds, is a weapon not lightly to be used; and in days when ecclesiastical judgments are subject to the supervision of a tribunal comprising all the elements which go to the making of a trustworthy Court of Appeal,

the confidence which must be felt in that tribunal, as well as the comity which should exist between Courts, require that the interference on the part of the temporal Courts with matters of ecclesiastical concern should be reduced to a minimum, and it is for a Court of prohibition to be punctiliously careful not to assume the functions of a Court of Appeal. No one, I think, who has weighed the arguments adduced by the parties to this appeal, and considers the difference of opinion which exists upon the points in dispute, both in the Court below and, I regret to say, in this Court, can positively affirm that either *Sir Robert Phillimore* or *Lord Penzance* has clearly mistaken the practice of his own Court, or that what either of them has done is, to quote the words of *Littledale, J.*, in *Ex parte Smyth* (3 A. & E. 719, 724) ‘manifestly out of the jurisdiction of the Court.’ That which has been done is what the ecclesiastical tribunal has said may be done and has itself done. It is something, the irregularity of which admits of a doubt. The proceedings against the respondent have resulted, however irregularly, in appropriate punishment being applied to proved acts of misconduct, and under such circumstances, I cannot but think that the only safe, and as a consequence, the only proper course for the Court below to have pursued was to refuse to interfere with the proceedings of the Ecclesiastical Court.” —*Thesiger, L.J.*, in *Martin v. Mackonochie* (4 Q.B.D. 734).

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*Illustrations.*

The Consistory Court of Hereford, upon articles against a beneficed clerk, pronounced sentence declaring that the articles were for the most part sufficiently and fully proved, and suspended him for three years. After sentence, a prohibition was sought on the suggestion that some of the articles contained charges cognisable at common law, but it was not denied that others were of ecclesiastical cognisance. *Held*, that, after sentence, it must be presumed that the Ecclesiastical Court had proceeded upon such matters as were within its cognisance, and rule

discharged. *Lord Denman* : " To get rid of the sentence of that Court, it is necessary to show that it has adjudged on matters which are in the proper jurisdiction of the Courts of common law. That we cannot find in the present case." His Lordship added that it was quite consistent with the sentence that the Court had acquitted as to the matters outside its jurisdiction. *Patteson, J.* : " It is laid down by several authorities, and not denied now, that, after sentence, unless the want of jurisdiction be manifest, this Court will not interfere. Supposing some of these articles to be founded on charges not within the cognisance of the Ecclesiastical Court, that might have been shown before sentence. By the sentence, the onus is shifted ; and the party objecting has to show that the Ecclesiastical Court proceeded on the objectionable articles. There is no affidavit to that effect ; so that the matter rests in uncertainty " : *Hart v. Marsh* (5 A. & E. 591).

" It seems to be clear that the application is not too late if an excess of jurisdiction appear ; that is to be considered as being either decided or recognised in *Carlake v. Mapledoram* (2 T.R. 473) ; and *Hart v. Marsh* (5 A. & E. 591). But it appears from those cases that the onus of showing such want of jurisdiction is cast on the party applying."—*Williams, J.* His Lordship was not satisfied that the inferior Court had in fact given its sentence upon matters of temporal cognisance, or whether it had not given the sentence only in respect of spiritual matters, and accordingly gave the defendant time to declare in prohibition : *Ex parte Evans* (7 Jur. (O.S.) 420).

A prohibition was sought after sentence in the spiritual Court, on the ground that the slanders alleged in the libel did not come within the jurisdiction of that Court. *Buller, J.* : " After sentence it is incumbent on the party making this application to show clearly that the Spiritual Court had no jurisdiction. If, therefore, it be doubtful, it is an answer to the application " : *Carlake v. Mapledoram* (2 T.R. 473).

Defendant ordered goods of the plaintiff's traveller in Battersea, and they were delivered to him at his place of business in Battersea, where he resided. Thereafter, letters passed between the plaintiff in London, and the defendant, which were held to constitute an " account stated " in London. An action was brought in the Mayor's Court " for goods sold and delivered at the defendant's request and upon accounts stated." A prohibition was refused—there was a sufficient admission of the debt to support an account stated and to warrant the Court in assuming that there was a cause of action which arose wholly within the Mayor's Court's jurisdiction. " We, in this Court, think it is obligatory on us to grant a prohibition if it be clear upon the law and the facts that the inferior Court is proceeding without juris-



diction. If it be doubtful, we do not interfere. It being doubtful here, and there having been a statement of the account within the city, I think the writ ought not to go. I do not think the remarks in *Evans v. Nicholson* (32 L.T.N.S. 778), and *Wallace v. Allan* (32 L.T.N.S. 830; 44 L.J.C.P. 351), meant to make any distinction in this respect, as to whether the application was before or after trial. In *Evans v. Nicholson*, the Court held that the account stated in the city gave a complete cause of action there. It is true that the application was after verdict; but all that the Lord Chief Justice meant to say was that there the verdict and judgment were a means of enabling the Court to arrive at the conclusion that there was a complete cause of action within the city. But in *Wallace v. Allan*, where the whole cause of action arose without the jurisdiction, it was held that a mere admission of liability within the city would not sustain an account stated. Under the circumstances, I think this rule should be discharged without costs.”—*Brett, J.*, in *Taylor v. Nicholls* (1 C.P.D. 242).

Applicant sought a prohibition before hearing in the inferior Court, on the ground that title to land was in dispute. The prohibition was refused—“before this Court could interfere at this stage, it must be clearly proved that the title must come in question. It is not proved to my satisfaction that this case is in that position.”—*Stout, C.J.*: *Manawatu Athletic Park Co. Ltd. v. Smith* (25 N.Z.L.R. 911.)

Where the affidavits show a conflict of evidence upon the question which is to decide whether or not the magistrate has jurisdiction, the Court will not, before hearing, interfere and prevent him by prohibition from determining upon the evidence whether he has or has not jurisdiction. *Joseph v. Henry* (19 L.J.Q.B. 369), followed: *R. v. McCulloch* (2 N.Z. Jur. 76).

Plaintiffs sued in the County Court for arrears of a rent charge of £10 a year, issuing out of defendant's land. Sec. 60 County Courts Act 1888 gives jurisdiction where title to any corporeal or incorporeal hereditament comes in question, if “neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of £50 by the year . . . .” Defendant sought a prohibition before hearing on the ground that the true effect of the dispute was that the plaintiffs' interest in their land was attacked, and therefore, the title to their land, the value of which exceeded £50 a year, came in question, and the jurisdiction of the County Court was ousted. A prohibition was refused, *Lord Russell of Killowen, C.J.*, inclining to the view that the hereditament in dispute was the rent charge, which was worth only £10 per year, but “I am not absolutely satisfied that the construction which I have adopted is the right one; but the

onus lies on the defendants, who are attacking the jurisdiction of the County Court, and they have not satisfied me that their view as to the meaning of the section is correct": *Bassano v. Bradley* ([1896] 1 Q.B. 645).

The respondent had successfully appealed to Quarter Sessions from an order of justices made against him at the suit of the applicants. The applicants sought a prohibition on the ground that there was no jurisdiction in the Quarter Sessions to entertain the appeal. *Held*, that as the point was doubtful, prohibition would not lie after appeal. "This is an application for a prohibition, and if we acceded to it, the matter would be at an end, and any proceedings which the appellant might choose to take on the judgment of the Court of Quarter Sessions would be absolutely stopped. Under those circumstances, unless the matter is perfectly clear, we ought not to prevent the appellant from trying the question if he should think fit. In Com. Dig. tit. Prohibition, the rule is laid down that generally after an appeal, a prohibition shall not be allowed if the matter be not apparent, for by that the party affirms the jurisdiction. . . . My impression is that the appeal lies: it is not, however, necessary to give a conclusive judgment on that point, because the matter ought to be perfectly clear before we interfere by prohibition."—*Martin, B.* And *Pollock, C.B.*: "It is sufficient for us to say that there being a doubt, we ought not to interfere by prohibition": *Ricardo v. Maidenhead Local Board of Health* (2 H. & N. 257).

Commissioners under a local improvement Act had jurisdiction over certain "public places." The applicant was convicted of an offence against the Act in a place which the Commissioners asserted to be a public place, and sought a prohibition on the ground that the Commissioners had no jurisdiction over the *locus in quo*. *Jervis, C.J.*: "I think on the materials which are before us, we are bound to discharge the rule. There is no affidavit that the place where Birch (the applicant) committed the alleged obstruction was not in fact a public place. Birch's affidavit only states that the South Sands were part of the manor of S., and were not a street . . . or public place . . . within the meaning of the Act of Parliament, and were not, as he was advised and believed, within the jurisdiction of the . . . commissioners. . . . To say the least, it is a matter of very considerable doubt, upon the construction of the Act of Parliament, whether they have jurisdiction or not. Now, a prohibition is not a matter of absolute right. The party asking for it is bound to make out a clear case. . . . Not being satisfied that he is entitled to have this rule made absolute, we can only discharge it." *Creswell, J.*: "We are not bound to grant a prohibition ex

*debito justitiæ*, nor unless we are clearly satisfied that the inferior jurisdiction is about to exceed its powers. The affidavit . . . does not state that the place . . . was not in fact a public place, but that it was not a street . . . or public place . . . within the meaning of the said Act. And then it goes on to state something which is inconsistent with that." Rule discharged : *In re Birch* (15 C.B. 743).

*Johnston, J.* : " I should have very little doubt that the words ' shall adjudicate upon such claim and make such order between the parties in respect thereof and of the proceedings as to him shall seem fit,' in the latter part of sec. 72 of the Resident Magistrates Act 1867 gave power to grant costs, had it not been for the comparison of the wording of the English County Court Act, which contains an express provision to that effect. It is just possible that the Legislature may not have intended the magistrates to have such power. But upon the whole, I ought, to justify me in granting the prohibition, to be satisfied that the language of our Act is not large enough to include the power to grant costs, and I am not so satisfied." Prohibition refused *s McTaggart v. Hargreaves* (N.Z.L.R. 3 S.C. 77). Cf., however, *Andrew v. Collerton* (16 N.Z.L.R. 466).

A passenger sued shipowners for damages caused by the negligence of the defendants. The defendants obtained an injunction from the Court of Admiralty, restraining the plaintiff from proceeding with the action. The plaintiff applied for a prohibition against the injunction. *Held*, that the onus was on the defendants to show a right to prevent the plaintiff from pursuing his ordinary remedy, and a prohibition was granted to the Court of Admiralty : *James v. L. & S. Western Railway Co.* (L.R. 7 Ex. 287).

Where a parishioner was sued in a spiritual Court for a rate which was illegally imposed, he, after judgment, declared in prohibition. " The plaintiffs in this present suit have the right to cast the burden of proof on their adversaries. The law requires clear demonstration that a tax is lawfully imposed."—*Denman, C.J.*, in *Burder v. Velej* (12 A. & E. at 247).

An agreement for the purchase of land was signed by the purchaser in Middlesex. In an action by the vendor for the purchase money in the Mayor's Court, the defendant contended that, the contract having been made in Middlesex, the action was not within the jurisdiction. The plaintiff contended that, by oral agreement between the parties, the contract was not to be binding until a counterpart was signed by the vendor, and that, such counterpart having been signed in the City of London, the Court had jurisdiction. *Held*, that on signature by the defendant, the party to be charged, the presumption was that the

contract was, as against the defendant, at once complete, and that the onus of establishing a verbal agreement to the contrary lay on the plaintiff, the vendor. A prohibition was granted: *Alderton v. Archer* (14 Q.B.D. 1).

*Per Wilde, C.J.*: "Beyond all doubt it is the duty of a party who comes to this Court to ask for a prohibition, to lay before it proper grounds for inducing it to come to the conclusion that there has been an excess of jurisdiction on the part of the inferior tribunal." *Per Williams, J.*: "A prohibition ought not to go unless it clearly appears that the Judge of the inferior Court has acted without jurisdiction. The burthen of making that out is cast upon the party making the application." Therefore, where two complaints were brought in the County Court for different sums, each of which was within the jurisdiction, but the total amount of which was outside the jurisdiction, and the defendant applied for a prohibition on the ground that there was a splitting of the demand, a prohibition was refused, the Court not being satisfied that the two complaints were in respect of distinct causes of action: *Kimpton v. Willey* (9 C.B. 719; 19 L.J.C.P. 269).

Applicant sought a prohibition on the ground that the action was to recover fees of office (10 Vic. No. 10, sec. 4; now 1899 No. 13, sec. 11); respondent's affidavit stated that this was not so, but that he was suing for money had and received to his use. A prohibition was refused on the ground (*inter alia*) that it did not appear clearly that the amount claimed was for fees of office: *Evans v. Wedderburn* (15 N.S.W.R. 482).

Applicant was sued in a Small Debts Court at Q. He objected that he did not "usually reside" there, but the magistrate gave a verdict for the plaintiff. On application for prohibition, it appeared that applicant stayed in the district for a few weeks for the purpose of carrying out a contract, but in an affidavit in opposition, it was stated that the applicant said in the Court below that he was "living" in the district until the contract was finished. *Cohen, J.*, pointed out that the effect of the proviso to sec. 23 of 10 Vic. No. 10 had not been argued before him, and that possibly the applicant came within it. "Having regard to the cases of *Ex parte Slate* and *Holburd v. The Burwood Extended Coal Co.*, it seems to me impossible to make this rule absolute. The onus is on the applicant to make out that he is entitled to the writ. To say the least of it, my mind is in doubt, and therefore I must discharge this rule with costs." The Full Court, on appeal, 13 W.N. 146, had no doubt about the matter, and made the rule absolute, on the ground that the defendant's usual residence was not at Q.: *Ex parte Bowen* (12 W.N. 113).

*Innes*, J., after pointing out that whether applicant could be said usually to reside at W. was a mixed question of law and fact, and that the answer was by no means free from doubt, cited *Worthington v. Jeffries* (L.R. 10 C.P. 379), and added : " If, therefore, we were clear in this case that the Court had acted without jurisdiction, we should have to grant the writ. But it seems to me, on these affidavits, that the matter is, to say the least of it, left in doubt, and I therefore think the application should be refused." *Foster*, J. : " I am also disposed to think that the applicant resided at W., but I base my decision on the ground that, upon the evidence, I am not satisfied that the Court below acted without jurisdiction " : *Ex parte Slate* (7 W.N. 96).

It was submitted that the rule must fail because the defendant's affidavit did not show that the Local Court of Adelaide had no jurisdiction. It did not show where the defendant carried on business at the time of action brought. It merely said : " I am a butcher, of Redhill." *Way*, C.J., said : " But he might have a thriving business in Adelaide," and *Boucalt*, J., said : " He doesn't even say ' I carry on business at Redhill as a butcher.' " The point was held fatal. " We must discharge the rule on the ground that (the applicant) has failed to show that the jurisdiction of the Local Court of Adelaide is ousted " : *Fowler v. Hopkins* (22 S.A.L.R. 117).

In a prosecution for selling rum without a license (13 Vic. No. 29, sec. 2), neither the summons nor the conviction alleged that the quantity of liquor sold was less than two gallons. A prohibition was refused by *Lutwyche*, J. : " The summons gave the magistrates jurisdiction, and in so plain a case, every intendment ought to be made in favour of its exercise " : *R. v. White* ; *Ex parte Sidney* (1 S.C.R. (Q.) 9).

*Stephen*, A.C.J. : " The Court can make no presumption in favour of the exercise of jurisdiction by the magistrate . . . The law is that jurisdiction is not to be implied or inferred with respect to inferior Courts. Sec. 20 of the Justices Act 1902 enacts that every act done by any justice shall be taken to have been within his jurisdiction until the contrary is shown. . . . That section is intended for the protection of justices, and is not intended to dispose of the rights of parties : " *Ex parte Smith* (4 S.R. 110).

But where applicant was convicted of an offence under sec. 9, Children's Protection Act 1902, and the evidence showed that the offence was committed at Camperdown, no proof being offered that Camperdown was in New South Wales, a prohibition was refused. *Darley*, C.J., held that the case was governed by sec. 20 Justices Act, and distinguished this case from *Ex parte Smith* (4 S.R. 110), on the ground that this was a prosecution by the Crown, while the earlier case was a



civil action *inter partes*, under a statute which required that the land should be situate in a certain district : *Ex parte Martin* (21 W.N. 123).

Applicant was sued in the Petty Sessions Court at Cooma, and verdict went against him. He now moved for a prohibition on the ground of non-residence, his affidavit stating that he lived in George-street, Sydney. The Court discharged the rule, refusing to take judicial notice that George-street, Sydney, was not within the limits of jurisdiction of the Petty Sessions Court, Cooma. Leave to file a proper affidavit was refused : *Ex parte Wright* (5 W.N. 11). [But see *Carberry v. Cook* (3 C.L.R. 995 ; 6 S.R. 263 ; 7 S.R. 1 ; 23 W.N. 75 ; 12 A.L.R. 265).]

Applicant was sued in the Court of Petty Sessions, Moama, on a contract made in Victoria, and a verdict passed against him. His affidavit on motion for a prohibition stated : " I am not and never have been within the jurisdiction of the Court of Petty Sessions at Moama," and he stated that he lived at Deniliquin. *Held*, that the affidavit was not sufficient to show that he did not usually reside in the district of the Court of Petty Sessions of Moama. The first allegation was an inference of law, and as to the second it was not shown that Deniliquin was not within the jurisdiction of the Petty Sessions Court of Moama. Leave to file a fresh affidavit was asked for.—*Ex parte Power* (5 W.N. 9); but *In re Wright* (5 W.N. 11), was cited in opposition, and leave was refused ; the rule *nisi* had been granted on an insufficient affidavit : *Ex parte Cammack* (21 N.S.W.R. 221).

The applicant being sued in the diocese of London, it appeared on the face of the libel that he resided at D., in Hampshire. He sought a prohibition on the ground that it appeared on the face of the libel that he was cited out of his diocese. It was answered by the Court that they could not take notice within what diocese D. in Hampshire was, for they could not *ex officio* take notice of the limits of bishoprics ; but they should *now* take it to be within the proper diocese : *Vanacre v. Spleen* (Carth. 33).

" A memorandum of objection to the jurisdiction has to be filed, and the Court may give itself jurisdiction. If the present case had depended on that point, we should take further time to consider, but it appears that the magistrates had jurisdiction on a possible view of the case to which I will now refer." His Honour then examined the facts and held that it was "competent for the plaintiff to assume in this argument that they must have come to the conclusion that the claim for cartage was not under the contract. . . In that view the question of territorial jurisdiction would not arise . . . Or the Court may have held . . . that there was an implied promise to pay on a

*quantum meruit* for extra cartage. On whichever view of the facts the magistrates proceeded, it was within their jurisdiction. . . I think we must hold that the question was one for the magistrates' decision, and the rule for a prohibition must be discharged. I should add with respect to this judgment, that in assuming all these things in favour of the plaintiff we have acted in accordance with the rule in *Taylor v. Nicholls* (1 C.P.D. 242) :—" We in this Court think it is obligatory on us to grant a prohibition if it be clear upon the law and the facts that the inferior Court is proceeding without jurisdiction. If it be doubtful, we do not interfere " : *McMullen v. McRae* (17 S.A.L.R. 93).

A. was sued for debt as a trustee and, on the case being dismissed without prejudice, he was sued for the same debt in his personal capacity, and verdict went against him. The affidavits were conflicting as to what evidence was given before the magistrate, and no depositions were brought up. " It is impossible to tell whether the magistrate was right on the evidence before him. It is, therefore, impossible to grant a prohibition."—*Stawell, C.J. : R. v. Langford ; Ex parte Luth* (1 A.J.R. 159).

On an application for a prohibition to restrain further proceedings on an order directing a *ca. sa.* to issue, the only evidence which can be considered as before the District Court Judge is that contained in the affidavits recited in the order : *Ex parte Jordan* (19 N.S.W.R. 25).

An order on a fraud summons (Act No. 284) did not recite that proof had been made of any of the conditions mentioned in the Act. A prohibition was granted—" the order ought to state facts disclosing jurisdiction, or from which jurisdiction to commit may be reasonably inferred " : *R. v. Lloyd ; Ex parte Gill* (5 V.L.R.C.L. 53). Cf. *Ex parte In Chun* (14 W.N. 12). [Cf. Victorian Act, No. 1100.]

An order made by a County Court Judge on a fraud summons committing defendant to prison, did not show jurisdiction on its face. On motion for a common law prohibition, *Stawell, C.J. :* " In order to sustain a prohibition at common law we must be satisfied that the Judge whom we are asked to restrain had no jurisdiction whatever in the matter. In the case of a statutory prohibition the Court can interfere, although the magistrate may have had jurisdiction, if he did not exercise it properly ; whilst in the case of a prohibition at common law we cannot do so. The distinction between jurisdiction and the mode of procedure is of the utmost importance. The cases to which we have been referred, where the Court interfered, were appeals on special cases by way of appeal from justices. In the present case the order complained of is admittedly bad on the face of it ; there is no attempt to support it, and if this were an application in *certiorari* there

would be little difficulty in quashing it ; but there is a difference between that and asking us to prohibit the enforcement of the order. There was jurisdiction, and the order may have been made for any of the causes stated in the Act—for not answering questions, or concealing property, or fraudulently incurring the debt ; although it is informally drawn up, probably through the clerk taking down too literally the verbal judgment delivered by the Judge. The rule for a prohibition will be discharged ” : *Regina v. Pohlman* (5 W.W. & A.C.L. 122).

An order of the Court of Mines, being merely portion of the record, need not on its face show jurisdiction, the record itself not being attacked. “. . . for instance it (the order) does not say that the applicant was served, and a variety of other matters of that class. This kind of objection would, in my opinion, be very likely to be good were the proceedings, in respect of which this rule is being moved, proceedings in a Court of Petty Sessions, because such a Court is not one of record ; but while the Court of Mines is, in my opinion, an inferior Court, being a Court of limited jurisdiction, and in *The Colonial Bank v. Willan* (5 A.J.R. 53) it has been determined to be, so far as the Supreme Court is concerned, an inferior Court, it is, notwithstanding that, a Court of Record, as is shown by sec. 115 of the Mines Act 1890, which states that ‘ such Court shall be a Court of Record.’ If the record does not show jurisdiction, it is possible I may not infer facts showing it ; but I have not the record before me. I have merely one small fragment of the proceedings. It is not pretended as a matter of fact that the Court had not jurisdiction, but that this document does not show it. This, however, is merely a portion of the record, and it is not, in my opinion, necessary for each document to recite everything before it.”—*Hodges, J. : Coates v. South Loch Fyne G. M. Co.* (26 V.L.R. 117).

A plaintiff had a verdict in a County Court on one count and the defendant on other counts. The plaintiff’s costs were taxed, and a prohibition was now sought to restrain execution on the judgment signed for these costs, it being contended that the Court had no jurisdiction to tax the costs, the Judge not having taxed the costs at the trial, nor ordered the Registrar to ascertain them afterwards. A rule *nisi* was refused. *Per curiam* : “ Sec. 38 of the County Court Statute, 1869 No. 315, enables the Judge, in special cases in his discretion, to direct the Registrar to fix the amount of costs after the trial ; how do we know that this was not a special case within the exception ? ” : *Rowe v. Thompson* (3 V.L.R.C.L. 135). [See now No. 1078, sec. 17.]

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#### D.—WHERE THE AMOUNT INVOLVED IS SMALL.

See Part I., Chapter VII., p. 272.

SECTION III.—CASES IN WHICH THE GRANT IS EX DEBITO  
JUSTITIÆ, NOTWITHSTANDING DELAY, ACQUIESCENCE, &c.

A.—WHERE THE DEFECT OF JURISDICTION IS APPARENT ON  
THE FACE OF THE PROCEEDINGS.

If the defect of jurisdiction, however such defect arises, is apparent on the face of the proceedings, the writ is *ex debito justitiæ*.

This rule is not affected by the fact that the applicant himself invoked the jurisdiction of the inferior Court.

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“The reason of the distinction between cases in which the excess of jurisdiction appears on the face of the proceedings and where it does not so appear, is explained by *Coleridge, J.*, in *Marsden v. Wardle* (5 E. & B. at 701). ‘There is reason,’ says the learned Judge, ‘for refusing the writ after judgment in the Courts where the proceedings set forth the detail of the matter and the party has the opportunity of moving before judgment. Then, if he chooses to wait and take the chance of judgment in his favour, he may be held incompetent to complain of excess of jurisdiction if judgment is against him. There is, however, good reason for departing from this principle where the defect is apparent on the face of the proceedings below; because the complaint in that case does not rest on the evidence of the complainant; and, if such a defective record were allowed to remain and to support a judgment, it might become a precedent: that which was in truth an excess of jurisdiction might be considered to have been held to be legal.’ The learned Judge is there evidently contrasting cases where the excess of jurisdiction depends on the evidence of the complainant with cases in which it is apparent on the face of the proceedings. In the County Court, it is true, there is no record, strictly speaking; but the distinction does not, I think, depend on the existence of a formal record, but is one substance, of

whether the defect is apparent or depends on evidence. In the present case the jurisdiction invoked is the creature of a statute, not even conferring jurisdiction in general terms, but confined to a particular defined subject matter. . . . In the present case the limits of jurisdiction appeared, I repeat, on the face of the statute, and the fact of the excess appeared on the face of the amended award which the Court was asked to enforce.”—*Davey*, L.J., in *Farquharson v. Morgan* ([1894] 1 Q.B. at 562).

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“The reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the face of the proceedings, is explained by *Lord Denman* in *Bodenham v. Ricketts* (6 N. & M. 170) to be for the sake of the public, lest ‘the case might become a precedent if allowed to stand without impeachment. . . .’”—*Lopes*, L.J., in *Farquharson v. Morgan* ([1894] 1 Q.B. 552).

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“It is conceded that, in view of the decision in *McIntosh v. Simpkins* ([1901] 1 K.B. 487), the existence of an affidavit substantially conforming to the form given in the Act is a condition precedent to the jurisdiction to make such an order as was made in this case. . . . In my judgment, the action taken by the judgment debtor does not prevent the issue of a writ of prohibition, because, as is shown by the decisions, there can be no waiver of a want of jurisdiction appearing on the face of the proceedings.”—*Vaughan Williams*, L.J., in *Alderson v. Palliser* ([1901] 2 K.B. at 836).

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“I believe it is said that a prohibition will be issued after judgment only where the matter is apparent—that is, where the want of jurisdiction appears on the record



and not where it is made to appear *aliunde*.”—*Wilde, C.J.*, in *Kimpton v. Willey* (1 L.M. & P. at 284).

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“ In the present case there is no dispute as to the facts, so that if the legal conclusion from the facts is that the subject matter of the action is not within the jurisdiction conferred upon the warden by sec. 254 Mining Act 1898, the plaintiff is entitled to a prohibition unless he has lost that right by *waiver or acquiescence*. The plaintiff took two objections to the jurisdiction in the Court below—(1) that the cause of action was not included among the matters set out in the fourteen subsections of sec. 254 (Mining Act 1898), over which the warden is given jurisdiction; and (2) that, if it was, the action did not arise within the district of the Warden’s Court. The first objection was certainly not taken too late. The plaintiff, it is true, had filed a counterclaim, which he afterwards withdrew, but he took the objection at once when the case came on for hearing. Furthermore, I do not think the objection was one that could be waived by acquiescence. As was said by *Erle, J.*, in *Jones v. James* (19 L.J.Q.B. 257), cited by *Cave, J.*, in *Moore v. Gamgee* (25 Q.B.D. 244): ‘Where an inferior Court has no jurisdiction from the beginning, a party, by taking a step in a cause before it, does not waive his right to object to the want of jurisdiction. But jurisdiction is sometimes contingent; in such case, if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards.’ If the subject-matter of the action did not come within any of the fourteen subsections of sec. 254, then the Warden’s Court would have had no jurisdiction from the beginning. The other objection seems to me really to come within the same category—at any rate, if the facts which manifest the existence of the objection are brought before the notice of the Court.

before judgment is recorded. There is no question as in *Jones v. James and Moore v. Gamgee*, of the jurisdiction being contingent. If the action arises within the district, the Warden's Court has jurisdiction; otherwise, it has not. There is no possibility of it having jurisdiction if the action arises elsewhere. In *Briscoe v. Stephens* (2 Bing. 213), a plaintiff had sued in an inferior Court for goods sold and had judgment given against him on the merits. He then brought a fresh action in the Court of Common Pleas, and the defendants pleaded the judgment of the inferior Court. The plaintiff replied that at the time he took proceedings in the inferior Court, both himself and the defendant resided out of the jurisdiction and that the cause of action arose out of the jurisdiction. It was held that the replication was good, although the plaintiff had himself invoked the jurisdiction of the inferior Court, and that if the statements in the replication were true, the proceedings in the inferior Court were *coram non jndice* and void to all intents and purposes. If a man bring an action in an inferior Court, where the cause of action did not arise within its jurisdiction, and the person or goods of the defendant are taken in execution under its process, the plaintiff in the action is considered a trespasser: *Williams's Saunders*, p. 103 (note 4); *Rex v. Danser* (6 T.R. 242). The cases, therefore, show that, at all events before judgment is recorded, there can be no waiver or acquiescence where there is a defect of jurisdiction over the cause, and that even after sentence there is no waiver or acquiescence, except that if the party has allowed the inferior Court to proceed to judgment without setting up the objection to the jurisdiction, the Court above will not interfere by prohibition at the instance of the party, unless the defect of jurisdiction is apparent upon the proceedings: see *The Mayor, &c., of London v. Cox* (L.R. 2 H.L. 239, at 282, 283). The rule as to actions in inferior Courts is thus laid down in *Williams's Saunders* (p. 99, note 3).

‘In actions in inferior Courts it is necessary that every part of that which is the gist and substance of the action should appear to be within their jurisdiction; therefore the consideration of the promise must be laid in the declaration within the jurisdiction.’ The numerous cases cited in this note fully bear out this proposition. Of course, it follows that the gist and substance of the action must be proved to be within the jurisdiction as well as laid in the declaration, and that in an inferior Court, where there are no pleadings, the gist and substance of the action must be proved to be within the jurisdiction of the Court before the Court can hear the case. As was said by *Davey*, L.J., in *Farquharson v. Morgan* ([1894] 1 Q.B. 552, at 563: ‘The first question which a Judge has to ask himself when he is invited to exercise a limited statutory jurisdiction, is whether the case falls within the defined ambit of the statute; and it is his duty to decline to make an order as Judge if and so far as the matter is outside the jurisdiction; and if he does not do so, he may be restrained by prohibition.’ In the present case, the uncontradicted evidence shows that the contract was made and the money paid in Dunedin, outside the limit of the district of the Warden’s Court, and that the contract was to be performed in Dunedin, the contract being for the allotment of shares in a company registered under the Joint Stock Companies Act in Dunedin. The plaintiff and defendant in the proceeding in the Warden’s Court are also described as ‘of Dunedin,’ and are not shown to reside within the jurisdiction of the Court. The first and essential step in the case was for the plaintiff to show that the cause of action was one which could be tried in a Warden’s Court, and that it arose within the jurisdiction of that particular Warden’s Court. Until that appeared, the Warden’s Court had no right to proceed. From the evidence adduced it appeared that the cause of action was not one which a Warden’s Court had jurisdiction to try,

and that it did not arise within the jurisdiction of the particular Court. This appeared also on the face of the proceedings, using these words in the sense in which they are used in *Farquharson v. Morgan*. There is no record in the Warden's Court, any more than in the English County Court, but the plaintiff here based his case on a written contract, just as in *Farquharson v. Morgan* he based his case on an award. The written contract here shows on its face, as the award showed in the case cited, that the cause of action did not arise within the jurisdiction. I think, therefore, that each objection taken in the Court below was valid, and that there has been no acquiescence. Furthermore, even if judgment had been entered, the case would have come within the decision of *Farquharson v. Morgan*, and, as the objection to the jurisdiction appears on the face of the proceedings, any suggested acquiescence would be immaterial. I think, therefore, the prohibition should go."—*Williams, J.*, in *Wells v. Carew* (19 N.Z.L.R. 349).

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"But in the above-mentioned case (*i.e.*, *Mendyke v. Stint*, 2 Mod. 271) these things were agreed by the Court : 1. That if any matter appears in the declaration which sheweth that the cause of action did not arise *infra jurisdictionem*, there, a prohibition may be granted at any time. 2. If the subject matter of the declaration be not proper for the judgment and determination of such Court, there also a prohibition may be granted at any time. 3. If the defendant, who intended to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, or by the attorney's refusing to plead it, &c., or, if his plea be not accepted, or is overruled : in all these cases a prohibition likewise will lie at any time."—*Bacon's Abridgement, Prohibition (K.)*.

A. obtained an injunction from a District Court Judge against B. B. moved to dissolve the order, and his application was granted with costs. Meantime the action was heard and verdict given for A. with costs, and the amount of this verdict and costs was paid by B., who now sought taxation of the costs of the motion to dissolve the injunction, and his costs were taxed in spite of A.'s objection that there was no jurisdiction to grant the injunction. On motion for a prohibition by A.—*Johnston, J.* (for the Court): “If there was no jurisdiction to grant the injunction, then as the defect of jurisdiction appears on the face of the proceedings, a prohibition will issue of right to either party, although judgment has been given. Where the defect is not apparent, and either party has acquiesced in the proceedings in the inferior Court, this Court will not as a rule interfere by prohibition after judgment at the instance of the party so acquiescing. Even in such cases, however, acquiescence does not give jurisdiction, but the Court assumes a discretionary power to refuse the writ. (See *per Willes, J.*, in *Mayor of London v. Cox*, L.R. 2 H.L. at 282, 283). In the present case, the party who set the Court below in motion is the party who now applies for a prohibition. We do not think that this circumstance affects the question. The applicant may thus have consented to the Court below exercising jurisdiction, but his so doing cannot confer any power on the Court below, which it would not otherwise have had. The reason for the interference of this Court by a writ of prohibition is that the inferior jurisdictions may be kept within their true limits; and, except in the cases above mentioned, the issue of the writ is altogether irrespective of the conduct of the parties. There is, however, direct authority that a prohibition will issue at the instance of a person who has himself instituted the proceedings sought to be prohibited. The answer to the 10th Article of the *Articuli Cleri* (2 How. St. Tr. 142), shows that at that time



all the Judges were of opinion that prohibition would go as of right to the spiritual Court, at the instance of a plaintiff in such Court. In *Lismore v. Beadle* (11 L.J.Q.B. 153), the plaintiff, in an action before the sheriff, after a verdict against him, and even after he had been refused a rule for a new trial, obtained a prohibition. The cases of *Ward v. Raw* (L.R. 15 Eq. 83), and *Andrews v. Elliott* (25 L.J.Q.B. 1), cited by Mr. *Stewart*, have no application where there is a complete want of jurisdiction, but show only that where there is a general jurisdiction and something is required to be done by the parties to enable the jurisdiction to be exercised, either party may, by his conduct, estop himself from contesting the fact that the requisite preliminaries have been complied with": *R. v. Harvey* (O.B. & F. 165).

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"The objection is that Mr. Gorham had no right by law to appeal to the Queen in Council, for the purpose of bringing the case before the Judicial Committee, and that he could only appeal from the judgment of the Court of Arches to the Upper House of Convocation. If this objection be well founded in point of law, it does not come too late, and the prohibition ought to be awarded to stay the execution of the sentence, for, on this supposition, the judgment of the Court of Arches against Mr. Gorham remains unreversed, the proceedings before the Judicial Committee and before Her Majesty in Council must be considered wholly void, and, the want of jurisdiction appearing on the face of the sentence, advantage may still be taken of the nullity": *Gorham v. Bishop of Exeter* (15 Q.B. 52).

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"This is a motion for prohibition after sentence, in which case we cannot go out of the proceedings to see whether the spiritual Court had any jurisdiction. But I

think it does appear on the face of the proceedings that the Court below had no authority to give the sentence which they have given ; and upon that ground a prohibition ought to be granted.”—*Buller, J. : Leman v. Goulty* (3 T.R. 3).

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“ It is clearly agreed that in all cases where it appears upon the face of the libel that the Admiralty, Spiritual Court, &c., have not a jurisdiction, a prohibition may be awarded, and is grantable as well after as before sentence ; for the King’s Superior Courts have a superintendency over all inferior jurisdictions and are to take care that they keep within their due bounds.”—*Bacon’s Abridgement, Prohibition (H.)*.

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*Per curiam* : “ If one be sued in the Spiritual Court for an ecclesiastical matter out of his diocese, it is too late to come after sentence for a prohibition ; because the party has affirmed the jurisdiction. So if he be sued for a matter not belonging to ecclesiastical consueance ; but if it appear on the proceeding that they have meddled with a matter that belongs not to them, a prohibition shall go after sentence ; but *secus* where that does not appear on the face of their proceedings ” : *Chickham v. Dickson* (12 Mod. 132).

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“ On showing cause against the motion, it was contended that the only ground of prohibition suggested, was a supposed want of jurisdiction in the Court below to proceed in the matter of a church rate where the sum to be recovered did not exceed £10, but that the objection coming after sentence was too late, unless it appeared on the face of the proceedings in that Court. And there is no doubt that in the case of prohibitions to be granted for the sake of trial, as distinguished from those which are to be granted

upon account of a wrong trial or erroneous judgment, the rule is established that a party neglecting to contest the jurisdiction in the first instance, and taking his chance of a favourable decree, shall not be allowed after sentence to allege the want of jurisdiction as a ground of prohibition, unless the defect appears on the face of the proceedings. The justice of the rule is very apparent, and the propriety of the exception scarcely less so; for it is the duty of this Court to restrain any encroachment of jurisdiction in the inferior Courts, and therefore it interferes for the sake of the public and not of the individual, where, the want of jurisdiction appearing on the face of the proceedings, the case might become a precedent if allowed to stand without impeachment.”—*Denman, C.J.*, in *Ricketts v. Bodenham* (4 A. & E. at 441).

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“Where the defect of jurisdiction is patent, delay is immaterial.”—*Per Sly, J.*: *Ex parte South Australian Brewing Co.* (8 S.R. 361).

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“It has long been settled that, where an objection to the jurisdiction of an inferior Court appears on the face of the proceedings, it is immaterial by what means and by whom the Court is informed of such objection. The Court must protect the prerogative of the Crown, and the due course of the administration of justice by prohibiting the inferior Court from proceeding in matters as to which it is apparent that it has no jurisdiction. The objection to the jurisdiction does not in such a case depend on some matter of fact as to which the inferior Court may have been deceived or misled, or which it may have unconsciously neglected to observe, and the Judge of such Court, therefore, must, or ought to have known that he was acting beyond his jurisdiction. I find no authority justifying

the withholding of a writ of prohibition in such a case.”—*Lord Halsbury*, in *Farquharson v. Morgan* ([1894] 1 Q.B. 552).

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“I think the rule with respect to the granting of prohibitions is this: that where a want of jurisdiction appears on the face of the proceedings, no acquiescence or laches by the applicant for the writ will give the Court power or discretion to refuse the granting of the writ; that, in fact, where the want of jurisdiction appears on the face of the proceedings, the Court is bound to issue the writ, and the reason given for that in a judgment of comparatively recent date by a learned Judge, was that in such cases the magistrate or Judge of the inferior Court ought himself to have seen that he had no jurisdiction, and should have acted accordingly.”—*Parker*, A.C.J., in *Wilson & Co. v. Gray* (7 W.A.L.R. 95).

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“The first point in this case, that the question of jurisdiction ought to be left to the District Court to decide, and that the Court ought not to interfere unless the Judge by some wrong decision has given himself jurisdiction where he has none, has been decided in *Ex parte Asher* (4 S.C.R. 71), where it was held that it is open to a party to apply at any stage of a case, as well after judgment and execution as before, for a prohibition to stay the action of an inferior Court, so long as the want of jurisdiction appears on the record.”—*Darley*, C.J.: *Anderson v. Burrows* (9 N.S.W.R. 150).

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“So, where the Court has no jurisdiction, a prohibition may be granted upon the request of a stranger, as well as the defendant himself (2 Inst. 607). So, upon motion of the plaintiff himself, who exhibited the libel (2 Inst. 602,

607 ; R. 2 Rol. 312 l. 10 ; Mo. 780).”—Comyn’s Digest, Prohibition (E.).

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“ As if a man libels in the spiritual Court for a matter which does not appertain to that Court, but to the common law, as a matter of frank-tenement ; yet he himself, against his own suit, may pray a prohibition, and shall have it.”—Bacon’s Abridgement, Prohibition (C.).

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“ On the first point, therefore, we are of opinion that, whether the superior Court be informed by the defendant or the plaintiff in the suit in the Court below, or by a stranger, the only discretion which the superior Court has to refuse a prohibition, is if it doubt in fact or law whether the inferior Court is exceeding its jurisdiction, or is acting without jurisdiction ; but if the superior Court is clear in fact and in law that the inferior Court is acting in excess of its jurisdiction, or without jurisdiction, it cannot rightly refuse to enforce public order in the administration of the law by refusing either to issue a writ of prohibition or to put the plaintiff in prohibition to declare in prohibition.”—*Brett, J., in Worthington v. Jeffries* (L.R. 10 C.P. 379).

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[But a party who institutes a proceeding in a Court of Justice is not thereby estopped from afterwards questioning their jurisdiction touching that suit : 4 M. & S. 120] : Comyn’s Digest, Courts (A.).

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“ If it appears that the Court had no jurisdiction the objection can never be too late.”—*Abbott, C.J., in Ex parte Williams* (4 B. & C. 314).

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In some cases the plaintiff himself who libelled may have a prohibition : *Stransham & Medcalfe’s Case* (1 Leon. 130).



*Et non refert* although the plaintiff in the spiritual Court brings this prohibition to stay his own suit, for if this Court hath knowledge by any means that the spiritual Court meddles with temporal trials, they ought to grant a prohibition: *vide* 1 Rich. 3 pl. 4: *Worts v. Clyston* (Cro. Jac. 350).

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A party who has himself invoked the jurisdiction of an inferior Court is not thereby disentitled to obtain a prohibition if the inferior Court, in fact, has no jurisdiction: *Slate River Sluicing Co., Ltd. v. Robinson* (6 N.Z. Gaz. L.R. 74). And see *R. v. Harvey* (O.B. & F. 165).

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A. was sued in a Consistory Court and judgment passed against him; he then instituted an appeal to the Privy Council, and now, before the hearing of the appeal, sought a prohibition against the Privy Council in respect of a defect that appeared on the face of the proceedings. *Littledale and Coleridge, JJ.*, held that, if the motion was well grounded, no objection would have arisen from the fact that the party moving was himself the appellant: *Chesterton v. Farlar* (7 A. & E. at 718).

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“We are further strongly pressed by the view that even had the want of jurisdiction appeared on the face of the proceedings, the applicant would be debarred from demanding a prohibition. We can understand a defendant who is brought into Court being so allowed, even though he remain passive and raise no objection. But here the party applying was the one to invoke the exercise of a jurisdiction of which he now complains. It is against a principle of law that an opponent should be compelled twice to a litigation involving the same points, at the instance of him who ran his chance of success on the first

occasion. It seems to us that he who invoked a jurisdiction should be estopped from afterwards, on failure to achieve his end, contesting and repudiating it, and thus putting his adversary to the expense of two contests instead of one. There appears to be no instance in which this has even been attempted. All the cases are where a defendant, or party called upon, has been allowed to prevent the execution of an order by a Court which has no jurisdiction to make it." Applicant had appealed from a mining warden to the Mining Appeal Court, and had then, when defeated on appeal, applied for a prohibition: *Ex parte Sherlock* (16 W.N. 94).

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*Illustrations.*

1. Subject matter, p. 347.
  2. Condition precedent, p. 350.
  3. Locality and person, p. 353.
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1. *Subject matter.*

An Order in Council empowered the Native Land Court to apportion certain land amongst the descendants of a certain native. By consent, portion of the land was given to the native's sister. On motion for a prohibition: "I agree, however, with the contention made by the present plaintiff's (the native's) descendants; they could not by agreement, acquiescence, or otherwise, give the Court jurisdiction to inquire into and determine the claims of the sister's descendants. The Court was not deceived or misled; it was aware of the want of jurisdiction. Acquiescence is no bar to an application for prohibition where the Court to be prohibited was aware of the want of jurisdiction and nevertheless proceeded. This is, as I understand, the reason why a distinction is made between acquiescence where the want of jurisdiction appears on the face of the proceedings, and acquiescence where it does not so appear. In the first case the Court is informed of everything; in the latter it is left in ignorance": *Wiremu Pomare v. Piukanana* (14 N.Z.L.R. 340).

Delay is not a bar when the ground of application is want of juris-

diction by reason of an order for costs being made when the Court had no power to award costs : *Ex parte O'Brien* (24 W.N. 197).

An application to prohibit an appeal was made by the respondent below, on the ground of want of jurisdiction to entertain the appeal. The appellant below had applied for an adjournment. *Held*, that he had not waived his right to a prohibition by acquiescing in the adjournment and asking for the costs of the day. "But even if there was a waiver, that did not give jurisdiction; the jurisdiction of the District Judge was limited by statute, and consent could not give a jurisdiction which did not exist. The authorities are collected in the judgment of *Williams, J.*, in *Wells v. Carew* (19 N.Z.L.R. S.C. 349), a case which itself is in point. The same rule applies even though the party objecting to the jurisdiction is the person who has himself invoked it: *In re Makauri Block* (2 N.Z.L.R.S.C. 259)."—*Edwards, J.*: *Slate River Shuicing Co. v. Robinson* (6 N.Z. Gaz. L.R. 74).

A defendant who was duly served with a summons in the Small Debts Court in a matter in which the Court had no jurisdiction by reason of the amount of the claim being excessive, was held entitled to apply for a prohibition after judgment, although he had not appeared in the lower Court—following *Ex parte Atkinson* (3 S.R. 314): *Ex parte Kelly* (20 W.N. 186).

Where the want of jurisdiction of the District Court appears on the face of the record, the defendant may apply for a prohibition at any time, "whether after judgment and execution, or before": *Ex parte Roberts* (15 N.S.W.R. at 303).

Churchwardens duly convened a parish vestry and proposed a rate for repair and expenses of the parish church, but a majority of the assembled parishioners refused to make the rate; the churchwardens subsequently themselves made a rate, and this was held illegal and void. Upon a parishioner being sued for such rate and these facts appearing on the face of the rate and in the proceedings in the spiritual Court, a prohibition was awarded after admission of the libel to proof: *Burder v. Veley* (12 A. & E. 233).

Prohibition may be had after sentence where the spiritual Court has not original jurisdiction, for then it is never too late: *Parker v. Clerke* (3 Salk. 86).

Libel against Vanacre on a custom to repair a church wall *ratione tenurae*. After sentence, the defendant moved for a prohibition. "This libel having no other foundation, the Ecclesiastical Court could have no consueance thereof till the action was tried at law; and for that reason a prohibition was granted to try it. . . . And so note a difference that if upon the face of the libel it appears that the spiritual Court can

have no consuance of the cause *ut supra*, or if it appears that the party is an inhabitant at a place out of the diocese, there the libel is *felo de se*, and in such cases the sentence makes no alteration; but 'tis otherwise where no such thing appears on the libel": *Vanacre v. Spleen* (Carth. 33).

A prohibition moved for after sentence was granted where the libel was for defamatory words which were libelled as one article of charge, and the sentence appeared on the face of it to have proceeded on all the words complained of, the words importing offences one of spiritual and the other of temporal cognisance: *Evans v. Gwyn* (5 Q.B. 844).

By the terms of the lease of a farm, it was agreed that upon the determination of the lease certain matters not within the Agricultural Holdings (England) Act 1883 should be the subject of compensation to the tenant, and that the procedure prescribed in secs. 7 to 28 of that Act should apply to such matters as well as to any claim under the Act. Upon determination of the lease, the tenant's claim for compensation was referred to arbitration in the manner provided by the Act, and an award was made which, on the face of it, showed that compensation had been awarded to him for matters not within the Act. A County Court Judge made an order to enforce the award by execution under sec. 24, Agricultural Holdings Act 1883. A prohibition was granted on the lessor's application—the defect of jurisdiction appeared on the face of the proceedings, and it was immaterial that the lessor had acquiesced in the exercise of jurisdiction by the County Court: *Farquharson v. Morgan* ([1894] 1 Q.B. 552).

Defendant consented to a suit in the County Court being referred to arbitration, but on the reference he objected to the jurisdiction on the ground that title to land came in question. It was urged that the defendant had acquiesced in the jurisdiction, and was therefore disentitled to prohibition, and *Jones v. James* (19 L.J.Q.B. 257) was relied upon. But the prohibition was granted; the latter case was distinguished on the ground that "an irregularity may be waived: where, however, the jurisdiction depends upon an Act of Parliament, the case is very different from that of waiving a defect in an order": *Knoules v. Holden* (24 L.J. Ex. 223).

An objection was taken that the applicants had been guilty of such delay as would disentitle them to obtain a prohibition. In answering the objection, counsel argued: "In this case the objection to the jurisdiction is one that goes to the subject matter of the case, and is not merely personal to the appellants. If the question is whether the Court below had jurisdiction over the subject matter, the question

of delay is immaterial : *per* *Faucett, J.*, in *Ex parte Broughton* (Knox 189). Want of jurisdiction over the person can be waived, and the question of delay is material upon that point, but consent cannot give jurisdiction over the subject matter if it does not exist." The Court gave no ruling upon the question, but were "inclined to think" that the distinction drawn by counsel was well founded : *Ex parte Howison and others* (3 S.R. 672).

A defendant who raises the objection in the Court below that the subject matter of the cause is not within the jurisdiction, and enters into evidence on the point, does not thereby lose his right to a prohibition on the ground of acquiescence : *Ex parte Ashe* (15 W.N. 76).

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## 2. Condition Precedent.

Applicant sued respondent in the Small Debts Court ; service was effected on respondent's agent (contrary to secs. 20 and 21 of 10 Vic. No. 10). The bench held that service on an agent was sufficient. The plaintiff, fearing a prohibition against him, withdrew from the case, and, on verdict for defendant with costs, a prohibition was granted on the plaintiff's application : *Ex parte Williams* (4 W.N. 133).

An affidavit in support of an application for leave to issue a judgment summons out of the district of the Court in which judgment had been obtained was defective as not being in accordance with Form 52A of the County Court Rules 1889. Leave was granted and an order of commitment made. A prohibition was granted—the defect of jurisdiction appeared on the face of the proceedings and could not be waived : *Alderson v. Palliser* ([1901] 2 K.B. 833).

By sec. 4 of the Small Debts Amendment Act of 1894 the leave of the Local Court is required for the entry of plaints in certain cases ; by sec. 74 of the Small Debts Act 1863, it is provided that until rules are framed and in cases where no such rule shall apply, the English County Court Rules shall apply. An application was made for leave to enter a plaint ; the affidavit (which was made by a clerk to plaintiff's solicitor) stated certain necessary facts upon information and belief ; there is no local rule showing how such applications should be made, but the English rules require the affidavit to be made by some person having knowledge of the facts. Upon judgment for the plaintiff, the defendant sought a prohibition. It was *held* that the affidavit is a condition precedent to the magistrate considering the question, whether he will grant leave or not, and that the affidavit in question did not comply with the rules. "Such being the case, it seems to me that the



leave was granted without jurisdiction, and the proceedings were bad from the commencement . . . I do not think I need refer to more than the case of *Alderson v. Palliser* ([1901] 2 K.B. 833), the head-note of which is—‘An affidavit in support of an application for leave to issue a judgment summons out of the district of the County Court, in which judgment has been obtained, was defective as not being in accordance with Form 52A of the County Court Rules 1899. Leave was granted, and an order for commitment made. On an application for a writ of prohibition, *held* that the want of jurisdiction appeared upon the face of the proceedings and could not be waived.’ Here, it seems to me, the want of jurisdiction clearly appears on the face of the proceedings, and if so, it cannot be waived. I think the rule with respect to the granting of prohibitions is this ; that where a want of jurisdiction appears on the face of the proceedings, no acquiescence or laches by the applicant for the writ will give the Court power or discretion to refuse the granting of the writ ; that, in fact, where the want of jurisdiction appears on the face of the proceedings, the Court is bound to issue the writ, and the reason given for that in a judgment of comparatively recent date by a learned Judge, was that in such cases the magistrate or the Judge of the inferior Court ought himself to have seen that he had no jurisdiction, and should have acted accordingly. That is where the want of jurisdiction appears on the face of the proceedings. Here, the want of jurisdiction appears to me clearly to appear on the face of the proceedings, as it appeared in the case of *Alderson v. Palliser*.”—*Per Parker, A.C.J.* *McMillan, J.*, took the same view : *Wilson v. Gray* (7 W.A.L.R. 95).

A statutory condition required a deposition on oath by plaintiff that he had a good cause of action in cases where defendant resides out of the magistrate’s jurisdiction. *Held*, on prohibition, that defendant could not waive such condition by appearing and resisting plaintiff’s claim on other grounds : *Howorth v. McBeath* (2 Macassey 653).

It was held that on a fraud summons an omission to take the examination of the debtor in writing invalidates the commitment, *though the omission be made at the request of the debtor* (Act No. 284, sec. 9) : *R. v. Shelley* ; *Ex parte Jones* (9 V.L.R.C.L. 297.) [See No. 1100, secs. 22, 25.]

The plaintiffs in the lower Court filed a plaint note which omitted to state the plaintiff’s address. It was attempted to distinguish this case from *Hewitt v. Carew* (22 N.Z.L.R. 569), on the ground that in that case the objection was taken at once, whereas it was not taken in the present case until after the hearing. But it was held by *Conolly, J.*, that “If there was no action in existence, no waiver or even direct consent could give the magistrate power to deal with a non-existent action. That

consent cannot give jurisdiction is a maxim so well known that it is unnecessary to repeat it." It was also objected that the applicant had waived any right to ask for a prohibition by appearing on several occasions, giving evidence, cross-examining witnesses and asking for adjournments. "... the hearing of the present case and the amendments made, and the judgment given, were all without jurisdiction. And since the defect *was apparent on the face of the plaint note and plaint*, the acquiescence up to a certain point by the present plaintiff could not give jurisdiction, or bar his right to prohibition even after judgment": *Loram v. Brabant* (22 N.Z.L.R. 990; 5 Gaz. L.R. 419).

The Marine Board (Victoria) has no jurisdiction to direct the Court of Marine inquiry to investigate at one and the same time charges against a certificated master of a steamship and against a pilot, being the persons in charge of the respective vessels that came into collision. Where such charges were heard together, a prohibition was granted; the consent of the parties that they should be so heard cannot give jurisdiction: *In re Forbes and the Marine Board* (24 V.L.R. 124).

The process in the Cinque Ports Court was Admiralty process on a Chancery bill, and a prohibition was sought. It was argued against the prohibition that the defendant had appeared there (in the Cinque Ports) and owned the jurisdiction. To this it was answered, *per curiam*, that when prohibition lies to the Cinque Ports, then this Court shall not be ousted of jurisdiction by any acknowledgment of the party, any more than in the case of the spiritual Courts: *Ting v. Mereuether* (1 Sid. 355).

A prohibition was granted on the ground that the complaint had not been laid within six calendar months from the time when the matter of the complaint arose, as required by 11 & 12 Vic. c. 43, sec. 11. The Court held that that section limited the jurisdiction of the magistrates, and that as the facts displacing the jurisdiction appeared on the plaintiff's proceedings, it was not necessary to plead them: *In re Prince; Ex parte Binge* (1 W.W. & A.C.L. 12). [See No. 1105, sec. 201.]

It was held that a judgment recovered in an action in the County Court, or a copy thereof, must be served on the defendant before the service on him of a fraud summons under sec. 83 County Court Statute 1869, calling on him to appear and be examined; it is not sufficient that the debtor was aware or had notice of the judgment against him; an omission to serve such judgment or copy thereof cannot be waived. Where such service was not effected, a prohibition was granted: *R. v. Casey; Ex parte Hutchinson* (12 V.L.R. 525). [See No. 1100, sec. 15.]

A bench wrongly constituted granted a license to A., and a prohibition was sought by B.; objected that B. had himself taken a license

from the same Court, and had so waived the objection. But the objection was held one that could not be waived : *In re Jones* (2 Macassey 780).

### 3. *Locality and Person.*

“ And so note a difference, that if upon the face of the libel it appears that the spiritual Court can have no consueance of the cause *ut supra*, or if it appears, that the party cited is an inhabitant at a place out of the diocese, there the libel is *jelo de se*, and in such cases the sentence makes no alteration ; but it is otherwise where no such thing appears on the libel. And in the case of *Tyler v. Mantell* before mentioned, it was said by the counsel at the bar that it appeared upon the face of the libel (which was for opprobrious words spoken) that Tyler was cited out of the diocese of London, in which sentence was given, for he was named in the libel to live at D. in Hampshire, and there the fact was laid ; whereas it is very well known that D. in Hampshire is within the diocese of Winchester, and not in the diocese of London, and affidavits were offered of that matter. But it was answered by the Court that they could not take any notice within what diocese D. in Hampshire was, for they could not *ex officio* take notice of the limits of bishoprics ; but they should now take it to be within the proper diocese ” : *Vanacre v. Spleen* (Carth. 33).

The respondent was cited to an Ecclesiastical Court, and the writ of citation described her as resident at a place within the jurisdiction. “ Now, if upon the face of this citation, it had been represented that she (respondent) was resident in Ireland and out of the jurisdiction of this Consistorial Court, then it would have been perfectly clear, on a settled and sound principle, that whatever this Court might have done in the suit, it might at any time and after any sentence, have been reversed, in respect of the want of jurisdiction apparent upon the face of the record ; but on the face of the citation there is no difficulty whatever. . . . ”—*Sir John Leach*, in *Chichester v. Donegal* (6 Mad. at 390).

A County Court Judge ordered a bailiff of a foreign County Court to pay damages for negligent execution of process issuing from the Judge's Court, though he had no power to do so (sec. 145 of 9 & 10 Vic. c. 95). It being urged that the bailiff had waived his rights by appearing and submitting, *Pollock, B.*, said : “ It is common knowledge that, to a certain extent, a person coming for a prohibition is liable to be told that he is not entitled to it because he has submitted to the jurisdiction which he seeks to prohibit. Sometimes the question is quite

plain, as where it is wholly immaterial whether a case is tried in one county or another, and a man goes before the Judge, though he is not bound to go; he not merely goes because it is the most convenient course, but he gets the benefit of the jurisdiction, and cannot then be heard to say that the whole proceedings were without jurisdiction. But there is no analogy between such a case and one where jurisdiction is enforced *in poenam* against a man. The High Court does not grant prohibition merely for the benefit of the party, but in order to keep an inferior Court within its jurisdiction; this is clear from the fact that a stranger to a suit may apply for a prohibition. Then is there any ground for saying that where the proceedings are of such a nature as those we are inquiring into, a prohibition should not go? I think not." His Lordship then referred to *Cox v. Mayor of London* (L.R. 2 H.L. at 282), and *Roberts v. Humby* (3 M. & W. 120), and concluded: "It is, therefore, a matter of high prerogative of the High Court that it should grant a prohibition where it is shown on the face of the proceedings that an inferior Court has exceeded its jurisdiction, and that being the case here, the prohibition must go": *R. v. Judge of County Court of Shropshire* (20 Q.B.D. 242).

Where an order for restitution of goods was made under 19 Vic. No. 24, sec. 10 (now 1901 No. 4, s. 32), the goods not being in a proclaimed district: *held*, that the applicant had not lost his right to a prohibition by omitting to take the objection till after the order was made: *Ex parte Clarke* (7 S.C.R. 146).

An information by a police officer was dismissed with costs against the Police Department. Execution was issued for the costs against the Police Department, and goods the property of the department were seized, but before they were sold a prohibition was applied for. *Held*, that the application was not barred by delay, as the defect of jurisdiction was patent, and that it could not be said that there was nothing to prohibit, inasmuch as the goods had not been sold. The query in *Denton v. Marshall* (1 H. & C. 654) discussed. *Kimpton v. Willey* (9 C.B. 719) and *Roberts v. Humby* (3 M. & W. 120), followed: *Kavanagh v. Herbig* (9 W.A.L.R. 121).

"We entertain no doubt that the process of foreign attachment can only be resorted to where the cause of action arose within the jurisdiction of the Court from which it issues. The garnishee is safe by paying under the judgment of the Court, but the objection that the cause of action did not come within the jurisdiction of the Court, if properly taken, must prevail. No agreement by counsel to abstain from making the objection can alter the law of the land, which says that an inferior Court can only hold plea where the cause of action arises within the

local limits to which its jurisdiction is by Charter or custom confined ” :  
*De Haber v. The Queen of Portugal* (17 Q.B. 171).

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#### B.—WHERE THE OBJECTION HAS BEEN TAKEN IN THE INFERIOR COURT.

If the applicant has raised the objection in the inferior Court, he is in the same position as if the defect were apparent on the face of the proceedings.

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“ A suggestion has been made that, inasmuch as this is a case of a latent and not a patent defect of jurisdiction, it is within the discretion of the Supreme Court to issue a writ or not ; and that the circumstances of the present case make it undesirable that the writ should be issued. But, apart from other considerations, it must be observed that the present plaintiff has taken the objection in the Court below, and therefore, if it is a case for prohibition at all, prohibition is a matter of right—see *The Mayor, &c., of London v. Cox* (L.R. 2 E & I. 239, 283).”—*Pennefather, J.*, whose decision was affirmed on appeal by *Prendergast, C.J.*, *Denniston and Conolly, JJ.*, in *McKenzie v. Couston* (17 N.Z.L.R. 228).

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It was argued that “ although the County Court is made by statute a Court of Record, no provision is made for keeping any record ; and the only documents at which this Court can look to see whether the County Court has exceeded its jurisdiction, are the plaint, summons, and entry of judgment, from which no excess of jurisdiction appears.” *Parke, B.* : “ The defendant having made the objection at the hearing, the plaintiff ought not to be in a better position because the Judge went on and gave judgment. Suppose we were to direct that the defendant should declare in prohibition, the other side would then be



bound to show that the County Court had jurisdiction. Some entry ought to have been made of the proceedings in the County Court, and the Judge ought to have made a note of the objection taken by the defendant on these proceedings. We ought now to treat the matter as if such an entry had been made.”

“ With regard to the first point, we are all of opinion that we must treat the matter, when before us, as if a note of the objection had been taken by the Judge of the County Court.” [His Lordship referred to *Gould v. Gapper* (5 East. 345).]—*Parke*, B., delivering judgment of himself, *Alderson*, *Platt*, and *Martin*, BB., in *Pears v. Wilson* (2 L.M. & P. 515).

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“ Acquiescence is no bar to an application for prohibition where the Court to be prohibited was aware of the want of jurisdiction, and nevertheless proceeded. This is, as I understand, the reason why a distinction is made between acquiescence where the want of jurisdiction appears on the face of the proceedings, and acquiescence where it does not so appear. In the first case the Court is informed of everything; in the latter it is left in ignorance.”—*Prendergast*, C.J., in *Wiremu Pomare v. Piukanana* (14 L.R. (N.Z.) 340).

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“ Several objections were raised to the issue of the writ. The first was that the application is too late, as it is made after the judgment. Now, as to that, I think that a passage from the very learned opinion delivered by *Willes*, J., in the case of the *Mayor of London v. Cox* (L.R. 2 H.L. 239) is absolutely conclusive against the defendant. He says: ‘ There is, indeed, a distinction . . . *Marsden v. Wardle*.’ Here the action was one of trespass, and there was what amounts to a plea ousting the jurisdiction, and a plea of *liberum tenementum*. Mr. Justice *Willes* proceeds

in the passage just quoted : ‘ Where, however, the defect is not apparent . . . see case of the *Admiralty*.’ This plainly is not such a case as is referred to by Mr. Justice *Willes*, for the defendant has not willingly allowed the District Court to proceed to judgment, but has pleaded to the jurisdiction and has had it decided against him. It might be said that the defect in jurisdiction is apparent on the face of the proceedings, but it is not necessary to insist upon that. It is enough, to bring the case within the authority of this judgment, to say that the question of jurisdiction was raised by the plea and was wrongly decided. I think, therefore, that the objection must be overruled ” : *Hunt v. Hardcastle* (N.Z.L.R. 3 S.C. 21).

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*Illustrations.*

*Assumpsit* in Windsor Court for meat, drink, &c., *apud* Maidenhead *infra jurisdictionem curiae* ; and upon *non assumpsit* the evidence there given was of meat, drink, and a promise *apud* Henley, which is *extra jurisdictionem*, for which the defendant offered to demur upon the evidence, but the steward would not admit thereof, whereupon verdict and judgment for the plaintiff ; and now upon the whole matter a prohibition was prayed, but denied ; for it is not grantable after judgment there. *Quære*, in this case, for the party hath no other remedy, he hath done all that he could to prevent judgment ; and at this rate they may give judgment in inferior Courts after verdict, before the defendant can be heard time enough to have a prohibition, and so tortiously enlarge their jurisdiction : *Jackson v. Nele* (2 Lev. 230).

After execution was awarded in the County Court and the defendant's goods taken in execution, though not sold, a prohibition to the County Court was moved for on the ground that title to land came in question. The rule was made absolute. “ The question was whether a prohibition should be granted to a County Court for an excess of jurisdiction not appearing on the proceedings, although the writ was moved for after judgment of that Court. And we answer this in the affirmative. There is reason for refusing the writ after judgment in the Courts where the proceedings set forth the detail of the matter, and the party has the opportunity of moving before judgment. Then if he chooses to wait and take the chance of judgment in his favour,

he may be held incompetent to complain of excess of jurisdiction if judgment is given against him. There is, however, good reason for departing from this principle where the defect is apparent on the face of the proceedings below, because the complaint in that case does not rest on the evidence of the complainant, and if such a defective record were allowed to remain and to support a judgment, it might become a precedent; that which was in truth an excess might be considered to have been held to be legal. But this principle has no application to the County Courts; the proceedings there do not show the matter in any formal way; the excess of jurisdiction may depend only on the defence set up orally by the defendant, and may only appear in the course of the trial, and judgment may follow almost as soon as the defence is understood. Under such circumstances there would be no opportunity of moving for a prohibition before judgment, and unless the motion was allowed after judgment, the excess of jurisdiction would be without redress. In *Jones v. Owen* (5 D. & L. 669), *Patteson, J.*, issued a prohibition to the County Court after judgment for defect not appearing in the written proceedings. So also did this Court in *Thompson v. Ingham* (14 Q.B. 710): *Marsden v. Wardle* (3 E. & B. 695; 23 L.J.Q.B. 265).

“There are no pleadings in this Court (*i.e.*, the Special Court under the Liquor Act, 1905 No. 40), but the parties directly affected by the determination of the Court may appear (sec. 72, sub-sec. 5). The applicants here did appear and state their objections. This objection to the ruling of the Court is filed in the Court, and in paragraph 20 of Mr. McCarthy’s affidavit, he says that he received various documents (making up exhibit ‘C’ to his affidavit, which were duly certified under the hand of the Registrar of the Special Court to be true copies of the original record, objections, exhibits, and other proceedings of the said Special Court). The objection to the Special Court’s ruling is contained in Exhibit ‘C’: see Shortt on Mandamus and Prohibition, at p. 448, dealing with patent and latent want of jurisdiction. ‘The distinction between a patent and a latent want of jurisdiction does not apply to the County Courts. The proceedings there do not show the matter in any formal way; the excess of jurisdiction may depend only on the defence set up orally by the defendant, and may appear only in the course of the trial; and judgment may follow almost as soon as the defence is understood. Under such circumstances there would be no opportunity of moving for a prohibition before judgment; and unless the motion was allowed after judgment, the excess of jurisdiction would be without redress’: *Per Sly, J.*, in *Ex parte South Australian Brewing Co.* (8 S.R. 361, at p. 396).

Defendant objected to the jurisdiction of the County Court on the ground that the whole cause of action did not arise within the jurisdiction, and, on the Judge deciding against him, appealed from the decision. It was *held* that this did not amount to acquiescence; the objection had been distinctly taken before the Judge: *Jackson v. Beaumont* (11 Ex. 300).

"The defendants have, I think, made out that the objection which was raised to the jurisdiction of the County Court was brought distinctly under the Judge's notice. The question, therefore, stands, in my opinion, on precisely the same basis as if the want of jurisdiction had appeared on the face of the proceedings."—*Per Pollock, C.B. : Denton v. Marshall* (1 H. & C. 654; 32 L.J. Ex. 89).

By sec. 45 of the Local Elections Act 1904, petitions in respect of irregularities in Elections are to be presented at the nearest Magistrate's Court. A petition was presented at a hall which was occasionally used as a Magistrate's Court, and at the hearing, the respondent objected that the hall was not a Magistrate's Court, but the magistrate decided that it was, and decided the petition in favour of the petitioner. *Held*, that there had been no acquiescence. *Per Stout, C.J. : "Had the point not been taken below, there would have been acquiescence, and prohibition could not have gone after judgment. The cases show that if an objection is taken at the time, even though the defect does not appear on the face of the proceedings, prohibition can be moved for after judgment." Per Cooper and Chapman, J.J. : "Acquiescence would not have given jurisdiction. There are many cases in the books in which acquiescence has been found or denied to have been in existence so as to affect the jurisdiction of an inferior Court, but it will be found that these cases relate to objections to the jurisdiction, which the party had power to waive. The distinction was always drawn in former times between those objections which go fundamentally to the jurisdiction of the Court to entertain a suit and those objections which go to the power of the Court to try the particular issue. Such objections as personal interest of the Judge, or that the suit involved title to realty, were objections that might be raised or waived by a party interested, and could not be raised by a party entirely without the suit" : Macnamara v. Bell (26 N.Z.L.R. 1231).*

The applicant was convicted before justices on an information which disclosed no offence. In granting a prohibition the Court said : "The objection was taken in the Court below, and the defendant was not guilty of lying by and permitting an error to be made of which he afterwards seeks to benefit" : *R. v. South Brisbane J.J. ; Ex parte Thornton* (1903 S.R. (Q.) 152).

A day labourer sued for wages under the Masters and Servants Act (20 Vic. No. 28). The defendant objected that as the hiring was not for any definite period, the justices had no jurisdiction under the statute. The defendant admitted that a certain amount was due. The justices decided that the questions as to period of hiring were immaterial and gave a verdict for the amount admitted by the defendant. *Stephen, C.J.* : " In so holding, the justices appear to me to have been in error, because the objection by the applicant's attorney went to the question of jurisdiction. But no consent by a defendant can confer jurisdiction on a tribunal if it have not the jurisdiction by law." *Held*, in fact that the evidence showed a hiring of the plaintiff for a definite period, and in any event sec. 5 embraces all contracts where wages have been earned and is not subject to the same restrictions as secs. 2 and 3 : *Ex parte Tighe* (Legge 1100).

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### C.—MEANING OF " APPARENT ON THE FACE OF THE PROCEEDINGS."

" It is conceded that, in view of the decision in *McIntosh v. Simpkins* ([1901] 1 Q.B. 487), the existence of an affidavit substantially conforming to the form given in the Act is a condition precedent to the jurisdiction to make such an order as was made in this case. That being so, the question is whether the absence of this condition precedent appears on the face of the proceedings. In my opinion it clearly does. It is apparent in the affidavit, which is part of the proceedings, because, before the Judge could have jurisdiction to make the order, he was bound to have the affidavit before him. We have it, therefore, that a statutory condition precedent to the jurisdiction is wanting, and that the defect appears on the face of the proceedings."—*Vaughan Williams, L.J.*, in *Alderson v. Palliser* ([1901] 2 K.B. at 836).

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*Stone, C.J.* : " With regard to Mr. *Forster's* contention that the want of jurisdiction need only be apparent to the magistrate, I think that is an erroneous view to take



of the law. Want of jurisdiction must be apparent to those before whom the case comes, whether before the magistrate at the hearing, or before the Judges before whom an appeal is heard, or a subsequent application is made for prohibition to prevent the magistrate from proceeding. . . . I am at a loss to know on the proceedings before me whether the magistrate had jurisdiction or not. Therefore I come to the conclusion that the want of jurisdiction is not apparent on the face of the proceedings." *Parker, J.*, read the judgment of *Lopes, L.J.*, in *Farquharson v. Morgan*, and added: " Obviously, therefore, Lord Justice *Lopes* was of opinion that this want of jurisdiction should be so apparent on the papers, so apparent on their faces, as to be apparent to the Judges of the Court before whom it came by way of appeal. It seems to me, therefore, in this case, that the want of jurisdiction is not apparent on the face of the proceedings, and consequently might be waived by the appellant. But I go further, and I am inclined to think that the cases in which it has been held that where there is an apparent want of jurisdiction on the face of the proceedings, and consequently no jurisdiction can be created by waiver or consent, apply only to cases where the Court has no jurisdiction, and not to cases where the Court might have jurisdiction if a certain thing occurred [*His Honour read Moore v. Gamgee (25 Q.B.D. 244).*] Had it been apparent to the magistrate on the face of the proceedings that he had no jurisdiction, still I think it was quite competent for the defendant in the action to have waived his right to object to want of jurisdiction, and by taking a step, that is, appearing in the action and taking no objection, to have conferred the necessary jurisdiction upon the magistrate. This was a case where jurisdiction was contingent upon proper leave being obtained (*scil.* to issue a summons) and although the want of jurisdiction might have been apparent on the face of the proceedings, it was quite

competent for the defendants, by taking a step in the action, to have conferred the necessary jurisdiction upon the magistrate, and he would thereby be precluded from taking any objection afterwards": *Davis v. Burt* (5 W.A.L.R. 76).

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"The defect of jurisdiction appeared also on the face of the proceedings, using those words in the sense in which they are used in *Farquharson v. Morgan* ([1894] 1 Q.B. 552). There is no record in the Warden's Court, any more than in the English County Court, but the plaintiff here based his case on a written contract, just as in *Farquharson v. Morgan* he based his case on an award. The written contract here shows on its face, as the award showed in the case cited, that the cause of action did not arise within the jurisdiction."—*Williams, J.*, in *Wells v. Carew* (19 N.Z.L.R. 349; 2 Gaz. L.R. 414).

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#### *Illustrations.*

Applicant was described in the libel as resident at D., in Hampshire; the suit being in London, he sought a prohibition and contended that it appeared on the face of the libel that he resided outside the jurisdiction of the London Court. But the prohibition was refused: the Court would not take judicial notice of the limits of dioceses or of the fact that "D. in Hampshire" was not in the diocese of London, and could not, therefore, say that describing him as of D. in Hampshire was a defect apparent on the face of the proceedings: *Vanacre v. Spleen* (Carth. 33).

By sec. 74 of the Small Debts Ordinance 1863, providing for the framing of Local Court Rules, the English County Court Rules apply where none of the rules framed apply. No rules had been framed dealing with leave to issue a judgment summons for service on defendants outside the limits of the Local Court's district. The magistrate gave such leave without such affidavit as is required by Ordinance XXV., rule 267, the English County Court Rules 1903. On motion for a prohibition, the writ was granted: the absence of such an affidavit is a defect apparent on the face of the proceedings, and the Court has no

discretion, but is bound to issue the writ : *Parker, A.C.J. : McMillan and Burnside, JJ. : Karim v. Rhail* (7 W.A.L.R. 127).

Action in the Bath Court of Requests by a voter against an objector, for expenses of attending in the Revising Barrister's Court, on the hearing of the objection. The Court of Requests had no jurisdiction to entertain such an action, but had jurisdiction to entertain an action for debt. The summons was "to answer a demand against you for 10s. for attendance on the 2nd day of October instant, on your notice, at the Revising Barrister's Court." The sentence was that the defendant pay the plaintiff 10s. for his debt, and 3s. 5d. for his costs. Argued that the summons was consistent with a claim for debt, as it might be for remuneration for attendance as a witness. But, *held*, that taking the summons and sentence together, the want of jurisdiction clearly appeared on the face of the proceedings : *Roberts v. Humby* (3 M. & W. 129).

"The only ground urged in opposition to making the rule absolute was that the objection to the jurisdiction was not taken before the magistrate, but this is got rid of if the want of jurisdiction appears on the face of the proceedings : *Ex parte Henderson* (7 W.N. 7). The conviction is signed by the two adjudicating magistrates, or justices of the peace, and there is nothing to show that either of them is a police magistrate, or signed as such. I think, therefore, I may reasonably and properly infer from it that a police magistrate did not form part of this Court. The point may, perhaps, hereafter arise whether a Petty Sessions Court, exercising a jurisdiction given to it by the Licensing Acts, should consist exclusively of a police magistrate, and although it is not necessary now to determine, I may express my own opinion that it should be so constituted" : *Ex parte In Chun* (14 W.N. 12).

An order was made by a deputy County Court Judge, after his deputation had ceased, and after the appointment of a new Judge. The new Judge received the decision of the deputy-Judge, and entered it as his judgment. *Williams, J.* : "I should be sorry to be supposed to lay it down as positive law that in all cases where the parties acquiesce in the adjournment of the decision by the deputy-Judge and allow the judgment to be entered after the powers of the deputy are at an end, they can be permitted to come to the Court and ask to have that judgment set aside on the ground that it was pronounced by an incompetent tribunal, without applying in the first instance to the Judge. I think it would be very inconvenient to hold that that can be allowed." *Willes, J.* : "It is said that the party complaining should have applied to the new Judge for a rehearing. But I am not aware of any case in which that has been held to amount to a condonation, or that mere

‘standing by’ has been thought to preclude the party from objecting to a defect of this sort” : *Hoey v. McFarlane* (2 C.B.N.S. 718).

An appeal to Quarter Sessions was heard by the chairman alone, though the Acts 9 Vic. No. 4 and 27 Vic. No. 17, require that there shall be at least one other justice. The chairman confirmed the order appealed against, no objection being made to the constitution of the Court by either counsel. On motion for a prohibition, it was held that the Court was wrongly constituted—that the case was *coram non judice*. *Hensman, J.*, added : “ Yet, although that be so, this Court has a discretion as to the writ of prohibition, and the question is as to whether it ought to grant the writ because the parties allowed the case to be heard without taking objection, and, consequently, may be said to have waived the question of want of jurisdiction. Upon a consideration of the authorities we find it generally laid down that where the want of jurisdiction is apparent upon the face of the proceedings, the Court should not exercise its discretion, but only in cases where there has been some lying by to see how the case results, and then the Court will say that the party is not entitled to the writ. The first case to which I will refer is that of *Buggin v. Bennett* (4 Burr.). There, *Lord Mansfield* said : ‘ If it appears on the face of the proceedings that the Court below had no jurisdiction, prohibition may be issued at any time, either before or after sentence, because all is a nullity ; it is *coram non judice*. But where it does not appear on the face of the proceedings, if the defendant below will lie by and suffer the Court to go on under an apparent jurisdiction, it would be unreasonable that this party, who, when defendant below, has thus lain by and concealed from the Court below a collateral matter, should come hither after sentence against him there and suggest that collateral matter as a cause of prohibition and obtain prohibition upon it.’ ” (His Honour then read the judgments in the following cases : *Knowles v. Holden*, 24 L.J. Exch. 223 ; *London Corporation v. Cox*, L.R. 2 H.L. 239 ; *Farquharson v. Morgan*, 63 L.J.Q.B. 474). “ At the commencement of this case, I think myself or one of the Judges asked what the applicant wanted to prohibit, and it turned out that what is really the substance of the matter is that the costs had not yet been paid. Had the costs been paid, probably the Court would not have been asked to interfere. Now, it was suggested that here the want of jurisdiction did not appear on the face of the proceedings, because the order of the Court is signed by the Judge. That may be, perhaps, the usual way in which these orders are signed, but I do not myself limit the meaning of the expression that it is apparent on the face of the proceedings. As a rule, the want of jurisdiction appearing on the face of the proceedings in all cases which occur, is not that the Court is not properly con-

stituted, but that there is something outside the jurisdiction. For instance, in County Courts in England, there must be a Judge sitting, and at Quarter Sessions in England, no one ever heard of one Judge sitting by himself. The Court is suspended if no other justice can be found to sit by the side of the chairman. The cases in England upon which the authorities run, are in questions in County Courts, where perhaps a question of title may come up, which is not apparent, and which is kept back by the party; or where, for instance, the cause of action arises outside the district. Now, in these matters, it is obvious that the fact may not appear on the face of the proceedings. But where we have a magistrate sitting in open Court, and it is obvious to everyone entering that Court, if they know the law, that he is not competent to sit by himself, it is an obvious want of jurisdiction which no assent on the part of the parties can cure. Therefore, the view I take is that this rule ought to be made absolute." *Parker and Muirhead, JJ.*, took the same view: *Beasley v. Wright & O'Donohue* (4 W.A.L.R. 108).

Where a statement of claim in an inferior Court referred to a lease, on the correct interpretation of which the magistrate had no jurisdiction, *Williams, J.*, held that the lease must be considered as incorporated in the statement of claim, and the defect was therefore apparent on the face of the proceedings: *Town v. Stevens* (17 N.Z.L.R. 828). [Cf. *Farquharson v. Morgan* ([1894] 1 Q.B. 552).]

By sec. 5 of the District Courts Act, 22 Vic. No. 18 (now 1901 No. 4, sec. 7) the District Courts had jurisdiction where the defendant resided within the district. By sec. 6 (now 1901 No. 4, sec. 8), "Provided always that in case the defendant shall have given an engagement . . . in writing to pay . . . at a particular place specified," the District Court in the district of which such place was should have jurisdiction. It appeared on the plaint and summons that the defendant did not reside within the district, and at the hearing, the defendant's attorney, as *amicus curiae*, objected to the jurisdiction on the ground of non-residence only. The objection was disallowed, and the plaintiff swore that there had been a verbal promise to pay within the district. The defendant took no part in the case. On verdict for the plaintiff, a prohibition was granted. *Per Stephen, C.J.*: "The defendant was not bound to object to the jurisdiction generally, or to negative facts bringing the case within sec. 6. On the plaint and summons and the objection of non-residence the burden lay on the plaintiff of showing that the case came within sec. 6": *Ex parte Grover* (1 S.C.R. 168). Cf. *Ex parte Asher* (4 S.C.R. 71).

Where the spiritual Court incidentally determines any matter of common law cognisance, such as the construction of an Act of Parlia-



ment, otherwise than the common law requires, prohibition lies after sentence, even though the objection does not appear on the face of the proceedings, but is collected from the whole of the proceedings below : *Gould v. Gapper* (5 East 345).

Where it appeared on the depositions that the title to goods claimed under sec. 10 of 19 Vic. No. 24 involved a dispute between the parties as to the title to certain lands, but the defendant did not in so many words take the objection that title to land was in dispute, *held*, on motion for prohibition, that the point as to jurisdiction was sufficiently taken in the Court below : *Ex parte James McSwan* (9 N.S.W.R. 417).

“Where the want of jurisdiction does not appear on the face of the record, this Court may, as in *McSwan’s Case* (9 N.S.W.L.R. 417 ; 5 W.N. 12), look at the evidence to see if that discloses any want of jurisdiction or acquiescence on the part of the applicant. In this case, neither the record nor the evidence shows any want of jurisdiction in the magistrates, but on the other hand, the evidence discloses in the clearest way the entire acquiescence of the applicant. I am, therefore, of opinion that he cannot now obtain a prohibition upon grounds that he did not see fit to disclose to the magistrates.”—*Per Darley, C.J.* “In *Ex parte McSwan* (9 N.S.W.L.R. 417 ; 5 W.N. 12), this Court must be taken to have held that on the evidence the objection was sufficiently taken below.”—*Per Stephen, J.* : *Ex parte Henderson* (7 W.N. 7).

“*Ex parte Henderson* (7 W.N. 7) is precisely in point. Here there is nothing to show want of jurisdiction, either on the record or on the evidence, nor was objection taken to the jurisdiction on this ground. In fact there was nothing in any way before the Court to show that the defendant did not live within the jurisdiction.”—*Darley, C.J.*, in *Ex parte Rowland* (12 W.N. 79).

A. sued B. in the Mayor’s Court for breach of contract, and A.’s evidence showed that the cause of action arose out of the jurisdiction, yet he had a verdict for £96. B. obtained a prohibition. Objection was made that, there being no plea to the jurisdiction in the inferior Court, the objection to want of jurisdiction came too late. “I am of opinion that it does not. At present no judgment has been given upon the verdict ; the case does not, therefore, fall within the decision of *Hall v. Norwood* (1 Sid. 165), which *Maule, J.*, in *Kimpton v. Willey* (19 L.J.C.P. 269), said was a ‘distinct authority to show that a prohibition will not go after execution has been completed ;’ the reason given being that there is no person to be prohibited (see also *In re Poe*, 5 B. & Ad. 681), nor within the more limited rule stated in *Ex parte*

*Cowan* (3 B. & Ad. 123), that you cannot apply for a prohibition after judgment, unless there be an original want of jurisdiction apparent on the face of the proceedings. In *Full v. Hutchins* (Cowp. 424), after sentence in the Ecclesiastical Court, a prohibition was refused, but that was upon the ground that the Ecclesiastical Court had jurisdiction of the cause, and the defect of jurisdiction alleged was only in the trial of an issue raised by the applicant and to the trial of which by the Ecclesiastical Court the applicant had submitted. For that reason, it was held, he could not have a prohibition after such trial, merely to avoid payment of costs. The essential difference between that case and the present is that in the case now before me, the Mayor's Court never had jurisdiction over the cause. Upon the same principle the rule for a prohibition was refused in the case in 10 East 349, cited in the notes. I do not feel it at all necessary to discuss the details of all the authorities cited in the course of the argument. I shall content myself, therefore, with saying that, having carefully considered them all, I have come to the conclusion that where, as in this case, upon the facts disclosed at the trial and relied on by the plaintiff, a clear want of jurisdiction in an inferior Court over the cause is for the first time made apparent, the defendant has a right at any time before execution has been completed to claim a prohibition to restrain all further proceedings, and to prohibit any further excess of jurisdiction."—*Hawkins, J. : Heyworth v. Mayor of London* (1 Cab. & Ell. 312).

Seamen sued in the Admiralty Court for wages, alleging "that it was covenanted and agreed, &c.," but it was not expressly alleged that it was by deed. The articles were set out at full length. They were annexed to the plea and referred to by it; and the *locus sigilli* was marked (L.S.) and it was prayed that they might be taken as part of the plea. After sentence against him, defendant sought prohibition on the ground that the contract was made on land and by deed, and that the inferior Court had no jurisdiction. *Lord Mansfield*, after stating that the prohibition would be refused because the defendant had "lain by," if the defect did not appear upon the face of the proceedings, added: "Now there is nothing upon the face of these proceedings which shows that the Admiralty Court acted without jurisdiction, or that what they did was *coram non judice*. The word 'covenanted' alone, is not sufficient to that purpose; that expression does not necessarily import that it was a contract by deed." *Yates, J. :* ". . . the matter was not shown, or urged, or relied upon as an objection to the jurisdiction of the Court of Admiralty; nor does it appear upon the face of the proceedings that the articles were made at land or under seal." *Ashton, J. :* ". . . They (the inferior Court) had no notice

that there was any objection to their jurisdiction." Here, *Sir Fletcher Norton* urged that want of jurisdiction does appear on the face of the proceedings. For, it does appear upon the allegation "that it was a contract by deed." And the articles are annexed and referred to, and 'tis prayed that they may be taken as part of the plea. The Court answered him that this allegation with its reference makes no difference; it does not prove that the contract was by deed. Every matter *dehors*, must, after sentence, be verified by affidavit. Why did they not rely upon this objection below? Why did they lie by and acquiesce till after sentence? : *Buggin v. Bennett* (4 Burr. 2035).

By letters patent appointing a chancellor for a diocese, the bishop gave him power to determine certain causes, "nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment." A suit was promoted for the removal of certain ornaments of a church in the diocese, and the respondents, in their answer, asked that the bishop should first be consulted, and his consent had, and earnestly craved his judgment. The chancellor heard the suit, and pronounced an order in which it did not appear that he had first consulted the bishop or had his consent. A prohibition was refused: "I think that even if this were a defect of jurisdiction, the defect does not in substance appear in the proceedings. What is shown here? It is shown that the cause was properly instituted and commenced in the Consistory Court. There was a defence put in which contained a plea, and the plea raised this question. The defendants objected that the chancellor should not proceed to hear, and should not give judgment unless he consulted the bishop. The petitioners insisted that the chancellor should go on, and the chancellor went on; he heard the case, he gave judgment, and he drew up an order ordering certain things. The order does not say that he did not consult the bishop. It is quite true that it does not say he did, but it leaves it perfectly open upon the face of the proceedings. We may know very well that as a matter of fact he did not think it necessary to consult the bishop, but I do not think we can say that that appears upon the proceedings, unless it appears upon what are the pleadings in the case and upon the judgment, so that it appears upon the record."—*Darling, J.* The same view was taken by *Channell, J.*: *R. v. Tristram* ([1901] 2 K.B. 141).

Libel in the spiritual Court for the word "where," which upon the face of the libel appeared to have been spoken in London. Prohibition was moved for on the ground that the defect of jurisdiction appeared on the face of the libel itself, and the Court will judicially take notice of the custom of London where an action lies for the word

" where." Argued *contra* : It is now too late : it should have been pleaded below. *Et per curiam* : The rule is that you shall never allege matters *dehors* the libel as a ground for a prohibition after sentence, but the foundation of our granting it must arise out of the libel itself in defect of jurisdiction. And if there be a defect of jurisdiction appearing in the libel, then the party never comes too late, for the sentence and all other proceedings are a mere nullity. But where the spiritual Court has original jurisdiction which is to be taken from them on account of some matter arising in the suit, as for defect of trial ; there after sentence, a party shall never have a prohibition because he himself has acquiesced in their manner of trial which is a waiver of the benefit of a common law trial. Prohibition refused on the ground that the custom of London was not judicially known to the Court : *Argyle v. Hunt* (1 Str. 187).

A plaint was entered in the Local Court for a sum claimed to be due for goods sold. An affidavit verifying the debt was filed in accordance with the Local Courts Act 1904, sec. 41, and a default summons was issued. The affidavit was informal in certain respects, and a prohibition was moved for on the ground that a condition precedent to the exercise of jurisdiction had not been fulfilled, inasmuch as the affidavit was by reason of such defects a nullity. The defendant filed notice of defence, and notice of trial was issued, but was not served on her as she had changed her address. Judgment by default having been obtained, she obtained a new trial, when judgment was again obtained by default. Another new trial was obtained, at which she objected to the jurisdiction on the ground of defects in the affidavits. A verdict was given against her, and she moved for a prohibition. *Held*, that the defendant, having appeared, it was unnecessary for the magistrate to look at the affidavit, and the defect was, therefore, latent, and waived by the conduct of the defendant : *Clancy v. Behrend* (9 W.A.L.R. 170).

Objection was taken to the jurisdiction of a Mining Appeal Court that, though there was a pronounced decision of the warden, there was no minute, as required by law, or certified copy thereof, produced to the Appeal Court as would be necessary to give that Court jurisdiction under 37 Vic. No. 13, sec. 106. " We agree with the argument so far, that the Court of Appeal, being without jurisdiction, ought not to have entertained the appeal unless this provision had been literally, or at all events substantially, complied with, and further, that if a document was produced, not in accordance with it, it would be a sufficient appearance on the face of the proceedings to justify a party who failed to make any objection, and lay by to take his chance of success, in moving at any time for a prohibition on the ground that the proceedings were *coram*



*non judice.* *Farquharson v. Morgan* ([1894] 1 Q.B. 552), is, in our opinion, an authority for this, but whether it could apply to the appellant party who brought his adversary before the Court and prosecuted the appeal both on technical grounds and on the merits, is a matter that may hereafter require consideration. What we have, therefore, to determine, is whether we can see from the evidence before us, whether the Judge knew, or ought to have known the fact from any document before him." The Court *held* that there was no document which showed on its face that the Judge had no jurisdiction. "Therefore, we must hold that the applicant cannot avail himself of the absolute unconditional right to stay proceedings of an inferior Court infringing the Crown's prerogative by usurping jurisdiction": *Ex parte Sherlock* (16 W.N. 94).

"In support of the application, *Sir F. Pollock* scarcely disputed this general doctrine, but he contended that, inasmuch as on the face of the libel the suit appeared to be for a rate under £10, the want of jurisdiction was from that circumstance alone, and by itself, apparent. It is necessary, therefore, to examine the statute 53 Geo. III. c. 127, sec. 7, to see whether this argument is maintainable. The section commences with a preamble stating the expediency that church or chapel rates of limited amount, unduly refused or withheld, should in certain cases be more easily and speedily recovered. It then goes on to provide for the case of a refusal or neglect by any one duly rated to a church rate or chapel-rate, the validity of which has not been questioned by any Ecclesiastical Court, to pay the sum to which he is rated, and gives a summary mode of enforcement before two justices, who are empowered to order the payment of what is due and payable in respect of such rate, so as the sum ordered to be paid do not exceed £10. An appeal is then given to the sessions, against such order, with a stay of execution pending the appeal. And this is followed by the material proviso: "That nothing herein contained shall extend to alter or interfere with the jurisdiction of the Ecclesiastical Courts to hear and determine causes touching the validity of any church-rate or chapel-rate, or from proceeding to enforce the payment of any such rate, if the same shall exceed £10, from the party proceeded against." If the section had stopped here, we should have thought it clear that a distinction was made between suits in which the validity of a rate was questioned and those in which, the rate being unsuspected, the only object was to enforce the payment; as to the former, that the jurisdiction of the Ecclesiastical Courts was left wholly untouched—in the latter, that it was by implication taken away where the sum does not exceed £10. This construction makes the enacting part of the section and the proviso



consistent, and both together to form a complete enactment on the subject. . . . If this construction be correct, it is obvious that the mere fact that on the face of the proceedings the suit appears to relate to an assessment for a sum not exceeding £10 cannot prove a want of jurisdiction in the Ecclesiastical Court to entertain the cause. Without entering into the argument at the bar as to presumptions for or against the proceedings of inferior Courts, or whether the doctrine applies to the Ecclesiastical Court, it is at least undeniable that this Court ought to examine the *whole* of the proceedings in order to collect from them, if it can, whether the suit admitted to be for less than £10, was a suit in which the *validity* of the rate, or the liability of the defendant was questioned, or whether it was merely for enforcing the payment; this being the real point on which the question of jurisdiction must depend. Now, upon such examination, it is obvious that the validity of the rate and nothing else was in question; it follows, therefore, that there is no want of jurisdiction apparent on the face of the proceedings . . .":—*Lord Denman*, in *Bodenham v. Ricketts* (6 N. & M. at 177, 178).

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#### D.—MEANING OF "POINT TAKEN IN INFERIOR COURT."

Action in the District Court to recover rates under sec. 5 of Municipalities Act (55 Vic. No. 33), though the rates were in arrear at the passing of the Act, and the District Court had no jurisdiction over the subject matter. No objection to the jurisdiction was made at the hearing and the point was taken on motion for prohibition that, as the objection was not taken below, it could not be taken on this motion. The defence raised on the hearing was that the defendant was not the owner of the property (*i.e.*, title to land). *Darley*, C.J., said: "Objection was taken to the jurisdiction, and if the Court see that by reason of sec. 5 the District Court had no jurisdiction, the Court will grant a prohibition, although that point was not specifically raised before the Court below": *Ex parte Lucas* (13 N.S.W.R. 228).

A rule for a prohibition was granted on the ground that the whole subject matter was not heard before two justices, as required by 17 Vic. No. 3. One of the justices sat and heard a part of the evidence; on a subsequent day it was heard by the P.M. and the same justice, the depositions previously taken before the one justice being read over. The accused was convicted. Objection was made that the point was not taken below, and *Stevenson v. Conolly* (2 S.C.R. (Q.) 84) was cited. *Lilley*, C.J.: "The case turned really upon the absence of certain evidence. It seems to me it did not turn upon the fact that the objec-

tion to the jurisdiction had not been taken in the Court below. It seems there was evidence that the book belonged to the hospital, but there does not appear to have been evidence to show that the book was of greater value than £50. If it was intended in that case to decide that there must be a specific objection to the want of jurisdiction in the Court below, then I should disagree with the decision entirely, and would not follow it": *Markey v. Murray* (2 Q.L.J. 7)

And see *Ex parte Grover* (1 S.C.R. 168); *Gould v. Gapper* (5 East 345); *Ex parte McSwan* (9 N.S.W.R. 417); *Ex parte Henderson* (7 W.N. 7); *Ex parte Rowland* (12 W.N. 79); *Heyworth v. Mayor of London* (1 Cab. & E. 312), *supra*, pp. 365, 366, 367.

## CHAPTER IX.

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**AT WHAT STAGE OF THE PROCEEDINGS THE WRIT MAY BE APPLIED FOR.**

**A.—QUIA TIMET**, p. 373.

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**A.—QUIA TIMET.**

Prohibition will not be granted merely because the applicant apprehends that the inferior Court will exceed its jurisdiction.

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“ But no man is entitled to a prohibition, unless he is in danger of being injured by some suit actually depending ; and, therefore, upon a petition to an archbishop or other ecclesiastical Judge, no prohibition lies.”—Bacon’s Abridgement, Prohibition (C.).

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“ Where an inferior Court is proceeding in a cause which arises on a subject over which it has jurisdiction, no prohibition can be awarded till the party sued in the inferior Court sets up a defence on some ground raising an issue which the inferior Court is incompetent to try.”—*Lord Cranworth*, in *Mayor, &c., of London v. Cox* (L.R. 2 E. & I., at 293).

“Where there is no *defectus jurisdictionis*, but only *triationis*, the defendant must plead it below, and have his plea disallowed, before he can be entitled to a prohibition.”—Buller’s N.P., 219 (b).

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*Illustrations.*

Prohibition shall not go for a modus or other foreign matter, unless it be first pleaded below : *Anon.* (2 Salk. 551).

A prohibition was sought on the ground that in a case in an inferior Court a question of title to land was likely to arise, but was refused : “The case has not yet been before the magistrate. Before this Court could interfere at this stage it must be clearly proved that the title must come in question. It is not proved to my satisfaction that this case is in that position.”—*Stout*, C.J. : *Manawatu Athletic Park Co., Ltd. v. Smith* (25 N.Z.L.R. 911).

A rector was cited in the Consistorial Court to show cause why the Ordinary should not grant to a parishioner a faculty for stopping up a window in a church against which it was proposed to erect a monument ; the rector dissented, but the Court was proceeding to make the grant with the consent of the Ordinary. A prohibition was refused : the rector could not be bound against his own consent, if his consent was by law material ; *non constat* that after the faculty was obtained the defendant would make use of it without obtaining the consent of the rector. And if the rector were made a party in the lower Court, and the law decided against him there, he could appeal. “But as yet no common law right of the rector is touched which calls upon us to prohibit the Ecclesiastical Court from proceeding to grant a faculty” : *Bulwer v. Hase* (3 East 217).

An appeal from a Consistory Court to the Privy Council was instituted, and while the appeal was pending, but before any proceeding had been taken in that Court, the appellant sought a prohibition against the Judicial Committee, on the ground that the rate in respect of which the appellant had been sued was bad, and appeared to be so from the facts stated on the pleadings. But the prohibition was refused—the matter was of ecclesiastical cognisance, and the Court could not assume that the Privy Council would decide erroneously : *Chesterton v. Farlar* (7 A. & E. 713).

A matter was down for hearing before a spiritual Court, in which they would be called upon to construe a statute. A prohibition was refused—the Court did not appear to have done anything as yet and

t was not to be presumed that they would construe the statute wrongly : *Hall v. Maule* (7 A. & E. 721).

It was alleged that a licensing committee prior to their election, promised that, if elected, they would grant no renewals. Eight holders of publican's licenses claimed a writ of prohibition and an injunction restraining the committee from adjudicating on the renewal applications. *Denniston, J.*, made an order restraining the committee from refusing the licenses for the reason only that the licensing was not required by the majority of ratepayers. The Full Court, however, held (*inter alia*) that the Supreme Court cannot, before a matter has come on for decision by a special tribunal, lay down a rule of law, and, while leaving such tribunal to deal with the cause, yet by injunction restrain it from going beyond or outside that rule ; but that if in any particular instance it is made clear that the inferior tribunal have acted in pursuance of a pledge upon which they have been elected, and not judicially, there are means of compelling them to do their duty : *Isitt (The Sydenham Licensing Committee) v. Taylor* (10 N.Z.L.R. 646).

Applicant had applied for certain land as a conditional purchase, and his application was confirmed under sec. 13 of the 1889 Act. At the end of his term of residence he applied to the Board under sec. 36 of the 1884 Act for a certificate of conformity. They entered upon an inquiry as to his *bona fides* in taking up the selection : a prohibition issued to restrain them from making such inquiry, as the Board exceeded their jurisdiction in holding such inquiry. Thereafter, a reference under sec. 20 of the 1884 Act was made to the Board by the Minister to inquire, *inter alia*, whether applicant had given evidence on obtaining his conditional purchase with the intention of misleading any officer. Applicant now sought prohibition on the ground that the Board was about to inquire again into his *bona fides*. " If we could see positively that the Minister had referred that matter to the Board, we should be inclined to grant a prohibition. Now the question is, whether we can see that a reference of that character has been made to the Board, for we cannot grant a prohibition unless we can plainly see that some illegal proceedings are going to take place. We cannot assume that the Board are going to exceed their jurisdiction, and that they are going to enter upon an inquiry which they have no power to enter upon." In the result, his Honour held that the reference was within the powers of the Board. " This reference does not necessarily authorise the Board to go into any matter which is beyond their jurisdiction ; if, however, they do go into the question of *bona fides*, they will be exceeding their jurisdiction, and in such a case this Court would grant a prohibition " : *Ex parte Smith* (15 W.N. 12).



Where the affidavits show a conflict of evidence upon the question which is to decide whether or not the magistrate has jurisdiction, the Court will not, before hearing, interfere and prevent him by prohibition from determining upon the evidence whether he has or has not jurisdiction. *Joseph v. Henry* (19 L.J.Q.B. 369), followed : *R. v. McCulloch* (2 N.Z. Jur. 76).

The guardians of the poor of a parish, being owners in fee of land, on part of which a parish workhouse had been erected, and another part of which land had been consecrated as a burial ground, prayed a faculty in the Consistory Court to authorise the building of a chapel for the inmates of the workhouse and other buildings connected with the workhouse, on part of the consecrated ground in which no bodies had been buried. No sentence had been pronounced by the Consistory Court, and a prohibition was refused ; though no faculty ought to be granted to apply consecrated ground to secular purposes, yet a distinction might be made as to the chapel, being an ecclesiastical purpose, and it was not to be presumed that the inferior Court would exceed its jurisdiction and grant the faculty for both the purposes prayed. "The case of *Hallack v. Cambridge* (1 Q.B. 593) is an authority for saying that where proceedings are pending before the inferior Court, having reference to several distinct things, one or more of which is within the cognisance or competence of the Court and others are not, this Court ought not to assume that the inferior Court will go beyond its competency and jurisdiction ; and therefore we ought not to interfere at the present stage of the proceedings. A prohibition may most certainly be applied for as well after as before the granting of the faculty, and if the Ecclesiastical court should proceed to pronounce judgment granting the faculty for all the purposes for which it is sought, there is nothing to prevent a fresh application being made to this Court after such sentence is pronounced."—*Cockburn, C.J.*, in *R. v. Twiss* (L.R. 4 Q.B. at 413).

Plaintiff's particulars in a Small Debts action showed, *inter alia*, items for "fees of office" (10 Vic. No. 10, sec. 4—see now 1899 No. 13, sec. 11). A prohibition was sought before hearing, but was refused. Even if the inferior Court had no jurisdiction in respect of these items, it had jurisdiction in respect of other items in the claim : *Evans v. Wedderburn* (15 N.S.W.R. 482). *Contra*—*Free v. Burgoyne* (5 B. & C. 400).

A prohibition was sought to prevent enforcement of a church rate in a Court Christian, it being alleged that though the rate was good on its face it was really imposed to pay a past debt ; but prohibition refused : the Court had jurisdiction to try that issue, and could be corrected by appeal if it went wrong ; "in the meantime, we must

presume that the Court Christian will correctly administer the law": *Griffin v. Ellis* (3 P. & D. 398).

Sec. 5 Debtors Act 1869 requires that, before committing debtors to prison, the order shall be made in open Court and shall show on its face the ground on which it is made. A County Court Judge made such an order in open Court, but suspended the order for a month. By the County Court rules, the Registrar has to keep a book showing (*inter alia*) minutes of orders. Defendant sought a prohibition on the ground that this minute of order did not show jurisdiction on its face, but the Court refused the application—the minute kept by the Registrar was not the "order" referred to in sec. 5. "That case, therefore (*Stonor v. Fowle*, 13 A.C. 20) is a direct authority to show that the order is that which in the present case has not yet been made, and therefore there is nothing to prohibit, for there is nothing to show that the requirements of the Debtors Act will not be complied with when the order is drawn up."—*Per Coleridge, C.J.*: *Harris v. Slater* (21 Q.B.D. 359).

An order was made by a magistrate on a judgment summons under 34 Vic. No. 21, sec. 3, directing the amount to be paid within fourteen days of the order. No formal order was drawn up, though there was a note of the order entered by the magistrate. The Court said: ". . . Further the fact that no order has been drawn up shows that there was nothing at all to prohibit. You cannot prohibit proceedings upon something that has not been done. Here there was a mere minute of the order and no formal order drawn up. In the same way a mere minute of the order of imprisonment would not have been sufficient to found a writ of prohibition unless the order had subsequently been drawn up (*Harris v. Slater*, 57 L.J.Q.B. 539)": *Ashton v. Marshall* (6 W.A.L.R. 79).

After pointing out that, even if the Board were going to make inquiry into certain matters, there was no ground for saying that they would exceed their power and authority if they did inquire into them—*Brett, L.J.*, adds: "There is therefore nothing to prohibit even if a prohibition (*i.e.*, against the Local Government Board) lies": *R. v. Local Government Board* (10 Q.B.D. at 327).

A rule *nisi* was sought to restrain a County Court Judge from further proceeding upon a judgment in an action (*Coleman v. Lawler and others*). The estate of the defendant had been sequestrated after action brought, and the other defendants objected at the trial that all proceedings were stayed by Insolvency Statute No. 379, sec. 75. The Judge of the County Court overruled the objection, and prohibition was now sought:—a rule *nisi* was, however, refused, *Stowell, C.J.*,

saying: "There is no such excess (of jurisdiction) as to justify this Court in interfering to prohibit all proceedings. A second judgment (*i.e.*, against the insolvent's assignee) has not been entered up yet; your application seems to be in the nature of a *quia timet*." His Honour intimated that if a second judgment were given for the plaintiffs against the insolvent's assignee it could be brought up and quashed: *Ex parte Welsh* (4 V.L.R.C.L. 52). [See No. 1102, sec. 77.]

A. sued B. in the Mayor's Court, and B. set up a counterclaim for a cause of action which arose out of the jurisdiction, and claimed thereunder an amount beyond the Court's jurisdiction. It was held that by secs. 89, 90 Judicature Act 1873, the Court had jurisdiction to inquire into the matter, but not to find for the defendant except to an extent necessary to rebut the claim of the plaintiff and, as regards the overplus, the defendant must apply for relief to another Court. "That being so, though in this case the counterclaim which is set up and the relief which is asked for is of a larger amount than that which would be sufficient to equal the claim of the plaintiff, yet that would not justify an application for a prohibition. The Court, in giving judgment, would have to give special relief to the defendants as regards their counterclaim, at all events to the extent necessary to equal the plaintiff's claim. Until the Mayor's Court has shown by some act that it is exceeding its duty or jurisdiction, the plaintiff has no ground of complaint."—*Thesiger, L.J.*, in *Davis v. Flagstaff Mining Co.* (3 C.P.D. at 242).

A testator died indebted to an attorney for costs (*inter alia*) of preparation of his will, which was left in the attorney's custody; the Prerogative Court cited the attorney (at the instance of the personal representatives) to bring in the will and leave it in the Registry. A prohibition was sought to stay all proceedings until the attorney's lien was satisfied. But prohibition refused—the Prerogative Court had jurisdiction to order the will to be brought in to the Registry, and *Denman, C.J.*, said: "We cannot presume that, when they have ordered the will in, they will do anything improper." *Taunton, J.*: "But at present it does not appear that anything is going to be done in derogation of the common law. . . . We cannot act upon the mere suggestion that it is likely they will proceed as this Court would not proceed": *Ex parte Law* (2 A. & E. 45).

The Prerogative Court summoned an administratrix to file an inventory and accounts of her administration and threatened to repeal the letters of administration unless she did so. A prohibition was refused—the Court had jurisdiction to require the accounts and inventory, and as to the threat, prohibition would not be granted *quia timet*: *Hill v. Bird* (Ayleyn 56).

A suggestion that the party had but one witness to prove the deed is not a sufficient ground for prohibition, unless such witness be offered and refused : *Roberts' Case* (Cro. Jac. 269).

In an appeal summons under Act No. 32, sec. 84, the names of all the parties to the original summons were entered, but all those named had not been served, and before the appeal came on no order had been made under the proviso to sec. 84 to substitute service. On motion for a rule *nisi* for a prohibition the Court held that the Judge had power to order substituted service at the hearing. "We certainly should not interfere by prohibition. This mode of asking for the opinion of the Court on motion for prohibition seems inconvenient, if not improper." A rule *nisi* was refused : *Re Rogers ; Ex parte Shean* (2 W.W. & A.C.L. 84). [See No. 1120, secs. 254-256.]

By the rules of an industrial society, disputes between the society and its members were to be settled by arbitration. A dispute having arisen between the society and a member, it went to arbitration, and the society sued on the award in the County Court. A prohibition was sought on the ground that the dispute in question did not come within the rules, and therefore the County Court had no jurisdiction. *Held*, that the application was premature. *Cockburn, C.J.* : "I do not see how we can interfere at present. If the Judge decides contrary to the facts, we might interfere ; but prohibition is not granted where the Court below is the tribunal to decide in the first instance and the case has not been before the inferior Court." *Mellor, J.* : "We cannot interfere till it is shown that there is an excess of jurisdiction : " *Skipton Industrial Society v. Prince* (33 L.J.Q.B. 323).

The *Charkieh* was a ship belonging to the Khedive, and had come to England for repairs with a cargo on board. She was not a man-of-war. Upon her trial trip she collided with and sank the *Batavier*, and the owners of the latter vessel caused her to be arrested by a warrant of the Court of Admiralty. A prohibition was sought on the ground that the Admiralty had no jurisdiction to entertain a suit against a foreign prince, but the rule was discharged : the Admiralty Court was the proper tribunal to decide whether, in the circumstances, the *Charkieh* was entitled to the immunity claimed : *The Charkieh* (L.R. 8 Q.B. 197).

[*Note*.—On the hearing of the case, reported L.R. 4 A. & E. 59, Sir *R. Phillimore*, at p. 71, points out that the Court of Common Law decided only "that the question was one upon which this Court was specially qualified to adjudicate."]

"This was a motion to rescind an order granted *ex parte* for a prohibition to a Licensing Committee against hearing an application for a

grant of a license in respect, as alleged, of an unfinished or non-existing building. The ground upon which the order was made was that, if the application was once heard and granted, no application for *certiorari* or prohibition would be successful. In moving to rescind, Mr. *Skerrett* contended that the application was premature, and cited *The Skipton Industrial Co-operative Society v. Prince* (33 L.J.Q.B. 323). In my opinion this contention must prevail." *Attorney-General, ex rel. Blower v. The Palmerston North Licensing Committee and J. A. Weight* (8 N.Z.L.R. 399).

The plaintiff sued in the Small Debts Court on particulars showing a claim for £11 Os. 10d., and gave credit for payments amounting to £7, and sought to recover the balance of £4 Os. 10d. Before the hearing a prohibition was applied for on the ground that the amount sued for exceeded £10. *Held*, that the defendant was not entitled to a prohibition on the ground of the plaintiff suing for over £10. "It is quite clear that the Court of Petty Sessions has not jurisdiction to enquire into and determine large matters of account between the parties, but it does not follow that, where there is a claim for a large amount, and that claim is then reduced by payment, the Court of Petty Sessions has not jurisdiction, because when the matter comes on in that Court, the defendant may be ready to admit that he had paid the amount for which he was given credit." . . . "If the case had gone to a hearing it would have been competent to that Court to see whether the amount for which the plaintiff gave defendant credit had been admitted, and whether a balance had been struck by the parties": *Evans v. Wedderburn* (15 N.S.W.R. 482).

The plaintiff sued the defendant for £4 9s. in the District Court at Forbes, and the summons was served on the defendant; defendant resided at Parkes, 20 miles from Forbes; a Court of Petty Sessions sits at Parkes, but Forbes is not included in the Petty Sessions district of Parkes. A prohibition was sought before the hearing (see sec. 5 District Courts Act; now sec. 7 of 1901 No. 4). It was held that the District Court has jurisdiction to hear such a case if the defendant appears and consents to its being heard, but cannot make an order against defendant if he does not appear. A prohibition was refused: *Hegarty v. Judd* (11 W.N. 146; 12 W.N. 13).

Where some matters only are outside jurisdiction see Part I., Introduction, pp. 20, 21. *R. v. Twiss, Evans v. Wedderburn*, p. 360.



**B.—AFTER INITIATION OF PROCEEDINGS AND BEFORE JUDGMENT OF THE INFERIOR COURT.**

Whether the defect of jurisdiction is apparent on the face of the proceedings or depends upon extrinsic evidence, a prohibition may be granted at any time after the initiation of proceedings and before judgment in the inferior Court; but where the jurisdiction of the inferior Court is ousted by reason of the defence raised, no prohibition can go until the facts ousting the jurisdiction are set up in the inferior Court.

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The rule is that where want of jurisdiction is apparent upon the proceedings, prohibition goes at any time after service of the process, and even before articles, “because it is much better for the party to apply for prohibition in the first stage than after expense is incurred”: *Francis v. Steward* (5 Q.B. 984).

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“It was insisted, however, that there was some substantial difference between the case of a patent defect of jurisdiction and a latent one, disclosed, as here, by apt averment and admission or proof. But this notion, *as applied to prohibition before judgment*, is quite antiquated . . . . and it is now settled law that prohibition goes not only for a patent defect, but also upon a surmise . . . . or suggestion of collateral matter . . . . The answer of the Judges to the 11th objection, *Articuli Cleri*, 3 Jac. I., was, ‘It is manifest that though in this libel there appears no matter to grant a prohibition, yet upon a collateral surmise the prohibition is to be granted, as where one is sued in a spiritual Court for tithes of *sylva caedua* the party may suggest that they were gross or great trees, and have a prohibition, and yet no such matter appeareth in the libel.’ And this is indeed manifest, because otherwise the party pursuer might gain an advantage for himself and put his adversary in a worse position by suppression or bare falsehood.”—*Willes, J.*

in *Mayor, &c., of London v. Cox* (L.R. 2 E. & I. at 281, 282).

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Argued that if the excess of jurisdiction appears on the face of the proceedings the defendant may apply for a prohibition before appearing, but if it depends on a question of fact, then the defendant must appear before he can obtain the writ. *Wadsworth v. The Queen of Spain*, and *De Haber v. The Queen of Portugal* (17 Q.B. 171; 20 L.J.Q.B. 488); *Cook v. Licence* (1 Ld. Raym. 346), and *Westoby v. Day* (2 E. & B. 605; 22 L.J.Q.B. 418), cited, but *Crompton, J.*: “I should pause long before I decided that an appearance was necessary to be entered in the Court below before applying for a prohibition, or that I could not look at the affidavits for the purpose of ascertaining whether or no there was a want of jurisdiction. I question whether the old authorities as to an appearance being necessary, would now be acted on”: *Manning v. Farquharson* (30 L.J.Q.B. 22).

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“To show that a prohibition could not be applied for till the objection relied upon was specifically made in the inferior Court, and overruled, the plaintiff’s counsel mainly relied upon the two cases of *Home v. Lord Camden* (2 H. Bl. 533) and *Chesterton v. Farlar* (7 A. & E. 713). In the former case it was held in the House of Lords, in conformity with the advice of all the Judges, that whether the misinterpretation by an inferior Court of a statute the consideration of which is confessed to be without its jurisdiction, be a ground for prohibition, or be not rather a matter of appeal, in such a case a prohibition will not lie unless it be made to appear to the superior Court that the party applying for the prohibition has in the inferior Court alleged the grounds for a contrary interpretation of the statute on which he applies for the prohibition, and that

the inferior Court has proceeded notwithstanding such allegation. But the opinion of the Judges, delivered by L.C.J. *Eyre*, on which the House acted, was founded entirely upon the reason that the inferior Court . . . had committed no excess of jurisdiction, and therefore that the misconstruction of an Act of Parliament was rather the subject of an appeal than of a prohibition. He says : ‘ The complaint made to the temporal Court is not that the sentence is wrong, which, indeed, the temporal Court had no jurisdiction to correct if it were wrong, nor is the complaint that the sentence was an excess of jurisdiction, or in any other respect a ground for prohibiting the Prize Court to carry it into execution. In *Chesterton v. Farlar*, a party who had appealed from the Arches Court to the Queen in Council, the appeal being referred by her to the Judicial Committee, while the appeal was pending, and before any proceeding had been taken in that Court, moved the Court of Queen’s Bench for a prohibition, on the ground that a church rate on which the suit had been commenced in the Consistory Court, was bad, as appeared by the pleadings there. The Court of Queen’s Bench (I think very properly) held that a prohibition could not be granted on this ground, the cause being before a Court the jurisdiction of which was not denied, no erroneous proceeding having been taken there, and this Court refusing to presume that the Judicial Committee would act incorrectly.’ Lord *Denman*, having pointed out that the Court before which the cause then was had jurisdiction over it and had not fallen into any mistake, adds : ‘ If in the progress of the cause the Court should commit any error, if they do anything against common law, or Acts of Parliament, we may then interfere.’ But in the case at bar the inferior Court had no jurisdiction to entertain the cause ; and before the prohibition was applied for, the inferior Court had committed a manifest error, and had clearly exceeded its jurisdiction by summoning the Queen of Spain, and

issuing an attachment against her": *Wadsworth v. Queen of Spain* (17 Q.B. 171).

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"Another class in which the exception must first be taken in the Court below is that in which there is general jurisdiction over the subject matter, but a defence is raised which the Court is incompetent to try, as where in a suit to repair a chancel the impropiator pleads a custom for the parish to repair, or raises a question of parish or no parish, which must be tried by a jury: see *Duke of Rutland v. Bagshaw* (14 Q.B. 869). In such a case the prohibition goes so soon as it appears that the special Court cannot proceed without trying the custom or taking a step towards trying it, even though it be not yet in issue or a plea thereof refused: *French v. Trask* (10 East 348); *Byerley v. Windus* (5 B. & C. 1). And in this class of cases, the prohibition acts simply in aid of the special or inferior Court, by trying what that Court had no jurisdiction to try, and upon an affirmative decision the prohibition is absolute, but upon a negative decision there is a judgment of consultation, upon which the special or inferior Court proceeds with the cause unhampered by the objection."—*Willes, J.*, in *Mayor, &c., of London v. Cox* (L.R. 2 E. & I. at 276).

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"... the reasoning is unanswerable, that if it appears to the prohibiting Court that the special or inferior Court will not allow the plea, the prohibition shall go without the idle ceremony of tendering there a plea which is sure to be rejected": *Ibid.*, at 277.

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#### *Illustrations.*

The applicant, a resident of Sydney, was sued in the District Court at Albury for a debt contracted in Albury while temporarily resident

there. The summons showed on its face that he resided in Sydney, and he applied at once for a prohibition, on affidavit that he had never (except for a short time as a visitor) resided in Albury, and had never given any promise in writing to pay the debt there. On motion for prohibition, *Wise, J.*, stated that the question for decision was whether a defendant sued in a District Court within the jurisdiction of which he never was a resident, can at once apply to the Supreme Court for a prohibition, or whether he must first raise the question in the District Court itself. "This argument is founded upon the enactment in the 6th sec., which gives jurisdiction to the District Court in several cases, notwithstanding the defendant's non-residence within the local limits of the Court, and it was contended that as in these cases the jurisdiction would depend upon a question of fact, it could not be anticipated that the District Court Judge would come to a wrong decision upon the facts before him, and that therefore it was premature for this Court to interfere. I was certainly much struck with the argument, but I am now satisfied that this Court must interpose by prohibition as soon as it is judicially satisfied that the suit is not within the jurisdiction of the Court, whether by reason of the subject matter, or of the non-residence of the defendant and the non-existence of any of the conditions required by the 6th sec. to give the District Court jurisdiction, notwithstanding the non-residence of the defendant within its limits. In addition to the cases referred to in the judgment of his Honour the *Chief Justice*, I would refer to *Re Walsh* (1 E. & B. 383). Prohibition was there granted before any appearance in the inferior Court, on the ground that the cause of action was not one of those which could be brought against a resident out of the jurisdiction, inasmuch as it arose out of the local limits of the Court. The present is the converse: the subject matter being within the jurisdiction, but the person not. The principle is, however, I think the same, and falls within what is laid down by Lord *Coke* (2 Inst. 602), that the King's Courts may award prohibition, being informed that any Court, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, as well after judgment and execution as before." *Stephen, C.J.*, distinguished *Kimpton v. Willey*, and *Lilley v. Harvey*, and *Skipton Industrial v. Prince*, on the ground that here the want of jurisdiction is apparent, until new facts be shown, on the face of the plaintiff's own proceedings—and that the question is not as to the exclusion of jurisdiction in a case ordinarily or presumably within it, but whether the defendant (on the description in the plaint) ever was personally amenable to that jurisdiction. He compared the case to *Sewell v. Jones: Ex parte Asher* (4 S.C.P. 71). Cf. *Ex parte Grover* (1 S.C.R. 168).



Wise, J.: "The course open to a defendant where the Court is without jurisdiction is twofold. He may on that ground apply to this Court for a prohibition before the case comes on in the District Court, or he may go before the District Court either actually or by awaiting its decision": *Ex parte Baillie* (5 S.C.R. 17).

A nominal defendant was sued under the Claims against Government Act, in the Newcastle District Court. Before hearing he applied for a prohibition on the ground of non-residence. *Windeyer, J.*: "There is nothing to support the argument that the defendant has come too soon for this prohibition. He is bound to come as soon as it appears that the lower Court has no jurisdiction, and if he delay, that may be used as an argument against him. In *Ex parte Asher*, Wise, J., says: 'I am now satisfied that this Court must interpose by prohibition as soon as it is judicially satisfied that the suit is not within the jurisdiction of the Court, whether by reason of the subject matter or of the non-residence of the defendant': *Boon v. Young* (16 N.S.W.R. 139).

The plaintiff's particulars in the District Court showed work and labour done, £1574 5s. 5d., and gave the defendant credit for £1411 7s. 2d., claiming the balance as due. The defendant obtained a rule *nisi* for a prohibition before hearing in the District Court. *Darley, C.J.*: "I think . . . that the case of *Anderson v. Burrows* (9 N.S.W.R. 150) governs this case. In that case it was argued, as it has been argued here, that the question whether the District Court had jurisdiction should be left to the District Court to determine. But the Court there held that, where the want of jurisdiction appears on the record, the defendant may apply to this Court for a prohibition at any time whether after judgment and execution or before. If this Court would not interfere before the trial in the District Court, *Wise, J.*, points out in *Ex parte Asher* (4 S.C.R. 71) what great injustice and hardship would arise, because if the District Court had no jurisdiction to hear the case, it would have no jurisdiction to award the defendant the costs of the action in the District Court" (see now 1905 No. 22, sec. 25). "In that case *Wise, J.*, also points out what is the proper course to adopt if there is on the affidavits any dispute as to the facts of the case upon which the jurisdiction of the District Court depends": *Ex parte Roberts* (15 N.S.W.R. 294).

Applicant had been ordered to pay a certain sum to complainant under the Infants' Protection Act, 1904 No. 27. On motion for a prohibition, *Pring, J.*, said: "It is the duty of the magistrate to see before he issues the summons that there is corroborative evidence. But if he issues a summons on insufficient evidence, I think the defendant can move for a prohibition at once and that is his proper course.

If he does not do that, all that the other magistrate has to do under sec. 9 is to hear the complaint. I do not think he has to embark on an enquiry as to whether the summons has been properly issued. The defendant being there before him, it is his duty to hear the complaint " : *Ex parte Jackson* (22 W.N. 30).

[Explained in *Ex parte Theiv* (23 W.N. 122). And in *Ex parte Anderson* (5 S.R. 448 ; 22 W.N. 121). *Darley, C.J.*, said that all that precedes the issue of the summons is merely matter of procedure.]

A bishop cited the dean and chapter to appear before him to show cause why he should not fill up a certain vacancy. The bishop had in fact no power to fill the vacancy, and a prohibition issued : " It is no answer to this rule to say that this application was made too early ; because the bishop has exercised a right to which he has no title, and is now endeavouring to enforce it " : *Chichester v. Harward* (1 T.R. 650).

An agreement having been filed in the Industrial Arbitration Court, notice was given that application would be made to have the terms of the agreement made a common rule, and application was made for a prohibition to restrain the Court from making a common rule, on the ground that there was no jurisdiction to make an industrial agreement a common rule. Objection being taken that the application was made too soon, and that the applicant should have waited till some step was taken, the applicant then gave evidence that advertisement and filing of notice of application were the ordinary and only method of initiating proceedings according to the practice of the Arbitration Court. *Griffith, C.J.* : " The rule is clearly laid down in *Mayor of London v. Cox* (L.R. 2 H.L. 239) that where want of jurisdiction is apparent upon the face of the proceedings prohibition goes at any time after service of the process, *i.e.*, as soon as the jurisdiction of the inferior Court is asserted. . . . It does not matter what the originating proceeding is ; as soon as it is filed the proceedings are begun, and if the want of jurisdiction appears on the face of them, any person may apply to restrain the Court from further proceeding " : *Master Retailers' Association v. Shop Assistants' Union* (2 C.L.R. 94).

Plaintiff sued in the spiritual Court for a tithe ; defendant had put in an answer of a modus (which ousted the jurisdiction), but had not regularly pleaded it. On prohibition being sought, it was objected that the applicant came too soon, as before plea there could be no issue, and it could not be told till then that the Ecclesiastical Court was proceeding to try the modus. But prohibition was granted " for it appeared that there was nothing to try in the Court below but the modus insisted upon in the defendant's answer " : *French v. Trask* (10 East 348).

Applicant was sued in the County Court on a plaint which showed that the cause of action was for injury to a reversionary interest in land. He applied for a prohibition before hearing, and objection was taken that he came too early, and should have waited and taken the objection in the County Court, when the County Court Judge would probably have refrained from trying the cause; but "if . . . the Judge had decided otherwise, an application on the same grounds as the present must have been made. . . . I therefore think that he may come now to the Court for a prohibition upon showing that the title is *bona fide* in question": *Sewell v. Jones* (1 L.M. & P. 525).

Extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title; if they sue in the Ecclesiastical Court to be quieted in possession of such seats, prohibition will go—that Court has no jurisdiction to try a prescription. "And this brings me to the second question, whether the proceedings are in such a state in the Court below as to warrant a prohibition at present. Where the spiritual Court has jurisdiction over the subject matter, it will have jurisdiction equally whether the claim is founded upon prescription or upon any other right: it is only when the spiritual Court is proceeding towards the trial of the prescription that a claim by prescription furnishes ground for a prohibition. If the prescription is admitted, the spiritual Court may go on with the cause . . . . But when once it appears by the proceedings in the spiritual Court that the prescription, instead of being admitted, is disputed, and that the parties are in progress to bring its existence to trial, the Courts of Common law are not bound to wait till the parties have incurred the expense of putting it in issue, but the prohibition is grantable at once; and it was upon this principle that the prohibitions were granted in *Darby v. Cosens* (1 T.R. 552), and in *French v. Trask* (10 East 348). Each of those was a suit for tithes; in each a *modus* was pleaded; and a prohibition was granted in each without any issue below upon the existence of the *modus*. In the latter case it was urged that the application for a prohibition was too early, because there was no issue upon the *modus*; but Lord *Ellenborough* answered: 'There was nothing the spiritual Court could do but try the *modus*.' The cause was necessarily in progress towards such trial; there was no alternative. . . . And it appears sufficiently upon the pleadings in this cause that the suit below is in progress towards the trial of the prescription."—*Bayley, J.*, in *Byerley v. Windus* (5 B. & C. at 22, 23).

Where the citation disclosed no offence cognisable by the Ecclesiastical Court, *held* that application might be made at once for a prohibition without waiting for articles: *Francis v. Steward* (5 Q.B. 984).

Prohibition to inferior Court before declaration to restrain them from holding plea of a matter arising out of their jurisdiction. Prohibition was prayed to the Court of the City of Bristol, on suggestion that an action was entered there by S. against W., on a matter arising out of the jurisdiction, and was granted by the Court, and such a prohibition was cited as having been granted here to the Court of Marches after the party had declared there : (Hill 16 & 17 Car. 2 Ro. 501), *Smith and Bond's case*. These prohibitions are founded on the Statute of Westminster : *Waineman v. Smith* (1 Sid. 464).

A prohibition was sought against an action in the Mayor's Court, on the ground that the defendant was a foreign sovereign. It was objected that the application could not be made before appearance in the Court below. But *held* that the Supreme Court was bound to interfere as soon as the excess of jurisdiction was shown and the sovereign might apply either as the party aggrieved or as a stranger : *De Haber v. The Queen of Portugal* (17 Q.B. 171).

A prohibition to the District Court under 1901 No. 4, sec. 38, is a Common Law prohibition. "The Act does not enlarge the jurisdiction in matters of prohibition" : *Ex parte McCarthy* (14 S.C.R. 285).

Where process issued out of the Mayor's Court against a garnishee, and the original debt did not arise within the city, and none of the parties was a citizen or resident within the city, *held* that the garnishee could obtain a prohibition without first pleading in the Mayor's Court the facts which ousted the jurisdiction : *Mayor, &c., of London v. Cox* (L.R. 2 H.L. 239).

### C.—AFTER JUDGMENT.

See Part I., Chapter VIII., p. 318.

### D.—AFTER EXECUTION—NOTHING TO PROHIBIT—RESTITUTION.

The writ will not be granted if nothing remains to be done in the inferior Court to which the writ can attach, or if there is nothing capable of being restored, or if there is no person to whom the writ can be directed.

"In all cases where it will issue after judgment, it will also issue after execution, except—

1st. Where there is no one having a right to interfere in the matter who can be prohibited.

2nd. Where there is nothing capable of being restored, or to which the prohibition can attach."

—Lloyd's Treatise on the Law of Prohibition, p. 22.

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"We, therefore, desired to be furnished with some authority (if any could be found) for granting a prohibition, after complete execution of the sentence imposed by the inferior Court; and several cases were at a subsequent day laid before us; none of which, however, on examination, appear to us to establish the proposition, while others are examples of acting on the contrary doctrine. In *Hall v. Norwood* (1 Sid. 165), the Court held that a motion for a prohibition came too late after judgment and execution in the Court below, because there is no person who can be prohibited. And a similar view is taken in *Darby v. Cosens* (1 T.R. 552), by *Ashhurst* and *Buller, JJ.*, the only Judges in Court, who support the prohibition on the ground that something remained to be done. But it is needless to enter at large into the law of prohibition in general, for a court-martial stands on grounds peculiar to itself. When it pronounced its sentence, it ceased to exist. To the Judge-Advocate no other duty then belonged than that of transmitting the sentence for approbation; and even supposing the case of *Grant v. Gould* (2 H. Bl. 69) to furnish some argument that a writ of this nature might be directed to him before execution of the sentence, still it is impossible to discover what he could be required to abstain from after execution. If, then, the writ were to issue at all, we see no Court or individual to whom it could be addressed other than the King himself, who, acting on the sentence, has been pleased to dismiss the officer from the service. Now admitting for a moment that it were possible to direct any writ directly to his



Majesty, when it is considered that this power is undoubtedly inherent in the Crown and might have been lawfully executed without any Court Martial, it will at once appear manifest that no prohibition can lie in such a case. For, what the King has power to do independently of any inquiry, he plainly may do, though the inquiry should not be satisfactory to a Court of law, or even though the Court which conducted it had no legal jurisdiction to inquire.”—*Denman*, C.J., in *In the matter of Poe* (5 B. & Ad. 681).

[The decision depends on the view that the Court Martial ceased to exist as a Court upon pronouncing judgment. But the note on p. 687 of 5 B. & Ad. states that this is not so—that Courts Martial are said in *I. Macarthur on Courts Martial*, p. 262, 4th ed., to remain in existence till dissolved by the same authority by which they were held; and the reason given is that they may be directed to revise the sentence or to intimate publicly in Court to the person tried, His Majesty’s pleasure, or that of the Commander-in-Chief.] Contrast *Johnson v. Haselden*, 12 N.Z. Gaz. L.R. 105.

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“ But on the part of the respondents the Court was informed that they had proceeded to judgment and execution at Dover, and for this they move here too late for a prohibition. And of that opinion was all the Court, inasmuch as there is no person to be prohibited and possessions are never moved or disturbed by prohibitions ”: *Hall v. Norwood* (1 Sid. 165).

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“ This is the first time that an attempt has been made to extend the writ of prohibition to such a case. Where there has been a complaint of an excess of jurisdiction in holding an inquisition to ascertain the value of property taken under an Act of Parliament, the course hitherto has

been to apply for a *certiorari*, with a view to quash the proceedings alleged to be illegal. What might have been the success of such an application in this case we are not called upon to say; but it clearly appears to us that the plaintiff has not entitled himself to a prohibition either against the sheriff of Surrey or the Commissioners of Her Majesty's Woods. He comes to us after the assessment, the verdict and the judgment, without seeking to set aside these proceedings, but praying that the defendants may be prohibited from entering or recording the assessment, verdict and judgment, or from acting upon them. But the recording of the verdict and judgment as directed by sec. 30 (9 & 10 Vic. c. 38), is not made a condition precedent to their validity and seems only to be intended for safe custody and facility of proof. Moreover, the duty of entering and recording them is not cast either on the sheriff or on the Commissioners. After the Sheriff has, under sec. 23, given judgment, ordering the sum assessed by the jury to be paid by the Commissioners, he is *functus officio*; and the judgment is declared to be thereupon binding and conclusive. The recording is to be in the office of Land Revenue Records and Enrolments—an entirely different office from that of the Commissioners of Woods. The only part of the prohibition prayed which could benefit the plaintiff, is that which would prevent the Commissioners from acting upon the judgment under sec. 40. Thereby it is enacted that, if any owner of lands specified in the schedule shall refuse to execute a conveyance thereof, upon payment in to the Bank of England of the sum assessed by a jury, the land and fee simple thereof shall from thenceforth vest in the Queen's Majesty, 'her heirs and successors, as part and parcel of the possessions and land revenues of Her Majesty in right of the Crown, who shall be deemed in law to be in the actual seisin and possession thereof to all intents and purposes.' But, the judgment being good upon the face of it, and being de-

clared to be binding and conclusive, how can we be asked to prohibit the Commissioners from acting upon it ? There is no judicial proceeding now to take place ; and there is no process of any Court to issue. The Commissioners of Her Majesty's Woods, according to the commands they receive from Her Majesty, may or may not, upon the plaintiff's refusal to execute a conveyance, pay into the Bank of England the sum assessed by the jury. If they were to do so, they would, as officers of the Crown, under the statutable power conferred upon the Crown, cause the land, the value of which has been assessed by the jury, to vest in Her Majesty, and she would be deemed to be in the actual seisin and possession thereof. Were we to grant a prohibition against this measure, we should be interfering with proceedings not judicial, but belonging to the executive government of the country."—*Lord Campbell*, C.J. (with *Patteson*, *Wightman* and *Erle*, JJ.), in *Chabot v. Lord Morpeth* (15 Q.B. at 457).

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“ The sentence being final and executed, it was argued that nothing now remained which this Court could prohibit from being done, and not even a continuing Court to which our writ could be addressed. These arguments, for obvious reasons, require to be narrowly watched, for they would give effect to unlawful proceedings merely because they were brought to a conclusion. But to the present case they are inapplicable. For, on looking at the sentence, we find that it admonishes the dean not to exercise the functions of dean on pain of the greater excommunication and that the Court was adjourned only when the motion was made. The infliction of that pain would be the mode of enforcing the sentence ; and this we may prohibit ; and we find in some of the entries that this Court has enjoined revocation of the sentence.”—*Lord Denman*, C.J., in *In the matter of the Dean of York* (2 Q.B. at 40).

“ The latter case (*i.e.*, *Hall v. Norwood*) is a distinct authority to show that a prohibition will not go after execution has been completed ; the reason given being that there is no person to be prohibited ; and possession is never taken away or disturbed by prohibition.”—*Maule, J.*, in *Kimpton v. Willey* (1 L.M. P. at 283).

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“ If we granted the writ under such circumstances, there would be no case in which the party was still alive, where an application like the present might not be made to this Court. I, for one, should pause before I established such a precedent.”—*Parke, J.*, in *In the matter of Poe* (5 B. & Ad. at 684).

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“ With respect to the other rule for a prohibition to the Court of Arches, the suggestion states that the proceedings are now depending in that Court ; for though a sentence has been given, yet the costs have not been paid, and they are now proceeding to compel payment of the costs. Then they are in fact proceeding in this suit, and therefore a prohibition must go . . . .” — *Buller, J.*, in *Darby v. Cosens* (1 T.R. 552).

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“ If this point had now to be decided, I should wish to see some other authority than the case which has been cited (*Jones v. Owen*, 5 D. & L. 669), in support of the proposition that the Court can in prohibition enforce the repayment of money which has been paid over by a proceeding against the party, or issue a writ of restitution. I do not understand by what mode this could be done, except in those cases which occur in the old entries. It could not be done by a mere order or rule of the Court.” — *Per Martin, B.* : *Denton v. Marshall* (1 H. & C. 654 ; 32 L.J. Ex. 89).

As to refusal of prohibition after execution, on the ground of delay, see Part I., Chapter VIII., p. 318.

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*Illustrations.*

After an appeal to Petty Sessions in the matter of a municipal assessment, the applicant applied for a prohibition to restrain the council and the magistrate who heard the appeal from further proceeding in respect of the assessment. A prohibition was refused: "To the magistrate it cannot go, because he has nothing further to do, the enforcing of the assessment not depending on the order made by him, the municipality having the power independently of him to enforce the assessment or not." *Chabot v. Lord Morpeth* (15 Q.B. 446; 19 L.J.Q.B. 377), followed: *Ex parte McInnes* (4 N.S.W.L.R. 143).

Justices held an appeal under sec. 185 Local Government Act 1878, against the valuation of certain property within the Brisbane Municipality. The justices assumed to decide the appeal, and also that the property was exempt from rating as it came within the exemptions in sec. 176. A rule was granted on the ground that the justices had no jurisdiction to determine whether the property was rateable or not. The rule was made absolute—all the justices had to determine was the correctness of the valuation: *In the matter of the Brisbane Municipal Council v. Watson* (1 Q.L.J. 127).

The borough of Caversham being desirous of carrying out some works in P. Street, applied to a resident magistrate, under sec. 7 Public Works Act 1882 Amendment Act 1883, to determine the respective liabilities of two boroughs adjoining that street in regard to the intended works. The magistrate held that he had jurisdiction to determine the matter, and on application for a prohibition, *Williams, J.*, said: "I think that it is a case where the Court has jurisdiction to issue a prohibition. The duty imposed upon the magistrate by the Act of 1883 is a judicial duty. His decision is final as to how the cost of maintenance of the road is to be apportioned. If the corporation of Dunedin stood by and allowed the magistrate without protest to make his award, it would be open for the corporation of Caversham to sue upon that award; and it would be at any rate dangerous to risk putting off till so late a period the defence that the case was not one which the magistrate had any business to adjudicate upon": *The Mayor, &c., of Dunedin v. E. H. Carew and the Mayor, &c., of Caversham* (N.Z.L.R. 3 S.C. 305).



Enclosure Commissioners, acting under 8 & 9 Vic. c. 118, went on a wrong principle in valuing the owner's interest in the land. A prohibition was granted to restrain them from proceeding with the enclosure. It was argued that: "This is not the subject matter of prohibition at all. The Commissioner only reports; the inclosure takes place under an Act of Parliament": *Church v. Enclosure Commissioners* (11 C.B.N.S. 664).

The Minister for Lands made a reference to a Land Board, who found certain facts: a prohibition was sought against the Board and the Minister. It was pointed out that there was nothing to prohibit, as the Board merely made a report, and its functions were then at an end, and that the Minister was not a Court, and so no prohibition could go to him. It was urged in answer that a prohibition would go to prevent him acting on the decision of the Board—but the rule *nisi* was discharged: *Ex parte Bennett* (19 N.S.W.R. 139).

C. was licensee of a hotel, and had given due notice of his intention to apply for a renewal. He transferred his license to applicant within ten days of the holding of the Court at which the application was to be heard. Applicant could not, therefore, give the ten days' notice required by sec. 5 of 46 Vic. No. 24. A renewal was granted by the Licensing Court. On motion for a prohibition, it was argued that there was nothing to prohibit—the Court had granted a certificate for renewal, and it only remained for the Treasury officials to issue the new license: the Court was *functus officio*, and had nothing more to do with the matter. But *Windeyer, J.*: "I am of opinion that the Licensing Court, in granting the renewal without proper notice by the licensee, acted entirely without jurisdiction. The order they made, therefore, and everything done under it by any person goes for nothing": *Bourke v. McGrath* (12 W.N. 12).

The Licensing Reduction Board having wrongly determined that a license should be cancelled, a prohibition was granted. *Cussen, J.*, said: "I have already pointed out that there would in a proper case be something to prohibit, even at this stage, as the Board has still to assess compensation, and will, I presume, give information or some form of certificate to enable the Licensing Court to decline to renew the license. If anything in our decision affects the conclusions of the Board with reference to other licensed premises, *e.g.*, by showing that premises dealt with as if in class (a) should have been dealt with as being in class (b), I think there is nothing to prevent the Board from now going on (subject to the provisions of the Act and the requirements of natural justice as to notice, &c.), to decide what shall be done in regard to such premises. Until the Board decides in accordance with law that prem-

ises should be deprived of a license, it should see that its previous erroneous decision (if any) is not given effect to": *R. v. Licenses Reduction Board* (1908 V.L.R. 79; 29 A.L.T. 148; 14 A.L.R. 7). And see *R. v. Licenses Reduction Board* (1909 V.L.R. 327; 30 A.L.T. 223; 15 A.L.R. 282).

It was objected that the Licensing Committee had granted a license to a hotel-keeper without having jurisdiction to do so. Upon application for prohibition or *certiorari*, *Denniston, J.*: "It is admitted that as the respondent has received his certificate, there is nothing to prohibit, and that the applicant must rely on the motion for *certiorari*": *Gaukrodger v. Stanford* (20 N.Z.L.R. 660).

An appeal had been heard by two members of the Land Appeal Court, the president having died, and no successor having been appointed. The Court so constituted sent the case back to the Land Board, and the Board, acting on the order of the Land Court, confirmed the respondent's application. A prohibition, or in the alternative a writ of *certiorari*, was applied for. It was held that the two members of the Court had no power to hear the appeal, and *Darley, C.J.*, said: "Since there is now no order to prohibit, I am of opinion that a writ of *certiorari* should issue": *Ex parte Matthews* (5 S.R. 131).

A dispute having arisen as to the title to certain gold mining claims, the Gold Commissioner made an order removing the applicants from the land. The applicants appealed to the Court of Appeal under the Goldfields Act, but this latter Court was not legally constituted when the appeal was heard. This supposed Court purported to affirm the order appealed from, and granted an injunction to restrain the applicants from working the land. The applicants sought a prohibition on the ground that the Court was illegally constituted. It was argued by the respondents that there was nothing to prohibit, inasmuch as (1) affirming an appeal was not doing, but only refraining from doing any act; (2) the Commissioner had jurisdiction to make the original order, and this was not got rid of by bringing it before a Court having no jurisdiction to deal with it. A prohibition was granted to the Court of Appeal without prejudice to the order of the Commissioner or to any appeal pending therefrom. "But it is contended that the writ should not issue because there is nothing to prohibit. I am of opinion that there is something upon which this writ will attach. The order of the Commissioner has not been confirmed by a duly constituted Court of Appeal, and if we refuse to grant this application, it will be equivalent to saying that the Commissioner's order had been affirmed by a Court of Appeal" (*Stephen, C.J.*). "We thus leave untouched

everything done prior to the proceedings before the Court of Appeal.”—*Wise, J. : Ex parte Bornulph* (1 S.C.R. 326).

The Special Court created by the Liquor Act 1905, is a Court of Record, and remains in existence after it has made the reductions of licenses : *Ex parte South Australian Brewing Co.* (8 S.R. 361).

The warden called upon to show cause having ceased to hold office, the order was directed to him or his successor : *Ex parte Dempsey* (13 W.N. 83).

At the hearing of an action before the County Court on 11th September, an objection to the jurisdiction over the subject matter was taken and overruled, and judgment given for the plaintiff. On the 20th September notice was given of the defendant's intention to apply for a writ of prohibition. On 10th October the debt and costs were paid to the Registrar to avoid execution, and on the same day a summons was taken out at Chambers, returnable on the 14th, calling on the County Court Judge and the plaintiff to show cause why a writ of prohibition should not issue. On the 13th it was served. On the 16th the Registrar paid over the debt and costs to the plaintiff's attorney. *Pollock, C.B. :* “The rule should be discharged. The defendants have, I think, made out that the objection was brought distinctly under the Judge's notice. The question therefore stands in my opinion on precisely the same basis as if the want of jurisdiction had appeared on the face of the proceedings. But my judgment proceeds on this, that those who seek redress must apply to the Court with promptitude, especially where the application is one of this character. In the present case the defendants are not entitled to relief, in consequence of the delay in their application. My brother *Martin* has pointed out that there is nothing to prohibit. There has been a judgment and an execution ; the money has been paid over by the Registrar and is no longer within the control of any Court ; the suit is at an end and the possession of the plaintiff's attorney is the possession of the plaintiff.” *Martin, B. :* “I also think that this application is too late. The consideration which influences me is that if this money was paid under the compulsion of process from a Court which acted without jurisdiction, a remedy is still available to the defendants by an action against those persons whose act compelled the payment. But where there has been a trial, judgment, and execution, and the money has been paid over, I am unable to see how a writ of prohibition can issue, or if issued, what object it can attain. There is, in such a case, nothing to prohibit. The forms of prohibition show that before judgment the prohibition to the inferior Court is to prohibit the holding of the plea. After judgment it is to prohibit the following of the plea. The latter form would, in the present case, be a mere

nullity." *Channell, B.* : " The question which in my view arises, and upon which alone I desire to express an opinion, is—what *locus standi* the defendant in the County Court has obtained by applying at Chambers for a writ of prohibition. By making that application, I think that he placed himself in the same situation as if the Court had been sitting at the time when the summons was taken out and the application had been made to the Court. I think, however, that the application was then too late." Rule discharged : *Denton v. Marshall* (1 H. & C. 604 ; 32 L.J. Ex. 89).

A. sued B. in a Resident Magistrate's Court and the hearing was fixed for 17th April. On that day the hearing was adjourned to 24th April, but B., being unable to be present on that day, telegraphed to a local solicitor to appear for him and obtain a further remand. When the solicitor got to the Court he found that judgment had been given for A., and execution issued. It was then agreed that judgment and execution should be stayed, the amount paid into Court, and a rehearing applied for. B. thereupon gave a cheque for the amount, but this cheque was dishonoured. Execution was thereupon issued, but B. thereupon paid the amount into Court and applied for a rehearing. The magistrate refused a rehearing and A. took the money out of Court. On the day after the refusal to grant a rehearing, B. telegraphed the magistrate not to pay the money out of Court, but no notice was taken of his telegram. B. now applied for a prohibition on the ground that the affidavit of jurisdiction required by sec. 34, Resident Magistrates' Courts Act 1867, was not made by A. himself, but by his agent. B., however, had taken no objection to the jurisdiction. *Williams, J.*, said : " I am of opinion that sec. 34, Resident Magistrates' Courts Act 1867 is mandatory and must be complied with. But whether complied with or not, in this case I am afraid the applicant has not made out his case. In order to entitle him to succeed, he must show that circumstances exist on which the Court will grant a prohibition, and that there is something to prohibit " : *McGregor v. Beswick* (N.Z.L.R. 3 S.C. 83).

Applicant had a verdict against him in a Small Debts Court, though he proved that the debt sued on was founded on an illegal consideration. He paid the money and costs into Court under protest, but subsequently withdrew the protest, and the money was handed to the plaintiff. The Court agreed that the magistrate had no jurisdiction in the first instance, but *Stephen, C.J.* : " The remaining question is, is there anything to prohibit ? The case was heard by consent before one magistrate only, and his decision being against the defendant, the money was paid under protest ; but that protest was then withdrawn and the money was



accordingly paid over to the plaintiff ; but after blowing hot and cold in that way, can the defendant in the Court below come here now and put all the parties to expense ? This is not a case of delay—it is worse : for had the protest not been withdrawn, the magistrate could not have proceeded : for if he had, he would have been liable to an action of trespass. *Denton v. Marshall* shows that material delay is a bar to a writ of prohibition issuing to a County Court. In the judgment, *Pollock*, C.B., says : ‘ The application is too late. I proceed entirely on the ground that though the objection to the jurisdiction was fairly before the Judge, as though it had appeared on the face of the proceedings, there was delay in urging the objection, which is fatal to success now, and there is nothing to prohibit—there is nothing within the control of the Court. Promptness of application is always a condition of being allowed the benefit of matters of exception to jurisdiction.’ And *Martin*, B., says : ‘ What weighs with me greatly is the consideration that if the defendants have paid the money under compulsion of a Court without jurisdiction, they have a remedy in an action of trespass. I do not, however, see how the form of the writ of prohibition could apply to this case in the position in which it stands. It has proceeded through trial and verdict to the satisfaction of judgment. The forms prohibit ‘ further proceeding in the action ’ and ‘ further proceeding upon the judgment obtained.’ Could an execution issue against the plaintiff if he refused to pay back the money ? Or could we issue a writ of restitution ? ” *Hargrave*, J., concurred : “ Had the defendant in the Court below adhered to his protest, he might have succeeded ; but now there is nothing to prohibit, as the money has been paid over to the plaintiff.” *Faucett*, J., concurred : “ *Denton v. Marshall* governs this case ” : *Ex parte Foster* (11 S.C.R. 195).

Action for slander in Small Debts Court and verdict for plaintiff, and execution. On execution the amount was paid—applicant said under protest, but the bailiff said not. The bailiff paid the amount over to the plaintiff. On motion for a prohibition, it was objected that there was nothing to prohibit. *Darley*, C.J. : “ The case of *Denton v. Marshall* is precisely in point. In that case, *Pollock*, C.B., says : ‘ But my judgment proceeds on this, that those who seek redress must apply to the Court with promptitude, especially where the application is one of this character. In the present case the defendants are not entitled to relief because of delay in their application. My brother *Martin* has pointed out that there is nothing to prohibit. There has been a judgment and an execution ; the money has been paid over by the Registrar, and is no longer within the control of any Court ; the suit is at an end and the possession of the plaintiff’s attorney is the possession of the



plaintiff.' In that case the money had not reached the party, but had only been paid to his solicitor. This is a stronger case, because the money has actually been paid to the party." *Innes*, J., pointed out that *In re Scully* is a very different case—it merely decided, following *Ex parte Taper*, that where in a criminal case a fine has been paid, this Court may, nevertheless, issue a prohibition. In that case the money had been paid into a Court over which this Court would have some control, but in this case the money has been paid to the party, over whom the Court has no control": *Ex parte Medlyn* (14 N.S.W.R. 276).

Applicant had paid the amount of a verdict of slander in the Small Debts Court, and prohibition was refused, but *Stephen*, J., in his judgment said: "In the case of a statutory prohibition, it may be that this Court would have power to order money which has been paid to the successful party to be returned, inasmuch as under sec. 12 of 14 Vic. No. 43 (now 1902 No. 27, sec. 115), the Court has power to make any order 'which shall be just and the circumstances shall require,' but that section in no way applies to this case, because the applicant is applying for a common law prohibition": *Ex parte Medlyn* (14 N.S.W.R. 276).

By consent of the parties to a suit in the County Court, the matter was referred to arbitrators. On the reference, the defendant objected that title to land came in question, but the arbitrators proceeded under protest by the defendant. *Held*, that notwithstanding the consent, the defendant was entitled to a prohibition. It was argued that *Yates v. Palmer* (6 D. & L.P.C. 283) shows that if the party allows the Court to proceed without protest or objection, as far as actual payment of damages and costs, no prohibition will go, but *Pollock*, C.B.: "There the proceedings had terminated." *Parke*, B.: "There was an end of the case; there was nothing to be done. There was nothing for the prohibition to operate upon": *Knowles v. Holden* (24 L.J. Ex. 223).

An information by a police officer was dismissed with costs against the Police Department. Execution was issued for the costs against the Police Department, and goods the property of the department were seized, but before they were sold a prohibition was applied for. *Held*, that the application was not barred by delay, as the defect of jurisdiction was patent and that it could not be said that there was nothing to prohibit, inasmuch as the goods had not been sold. The query in *Denton v. Marshall* (1 H. & C. 654) discussed. *Kimpton v. Willey* (9 C.B. 719) and *Roberts v. Humby* (3 M. & W. 120), followed: *Kavanagh v. Herbig* (9 W.A.L.R. 121).

Where money was paid by the applicant into Court under the order of justices, the money being paid under protest, but the Clerk of the Court paid out the moneys to the complainant without saying

anything about the protest, *held* that as the complainant took the money in good faith without notice of the protest, restitution would not be ordered : *Ex parte Potter* (1 S.C.R. 61).

Applicant was proceeded against under sec. 3 of 42 Vic. No. 23 for illegally impounding cattle, and ordered to pay a sum of money and costs on 3rd March. Demand for payment on 22nd March ; payment under protest 23rd March, and a rule was granted on 9th April. *Darley*, C.J., after stating that a statutory prohibition is merely an extension of the common law prohibition : " But the application remains one for a prohibition, and in the present case I think it should not be granted any more than if the application was for a prohibition at common law. The case, therefore, appears to me to be concluded by *Ex parte Medlyn* and *Denton v. Marshall*. The suit was completely at an end and the money paid over before even the rule *nisi* was applied for. There is therefore nothing to prohibit, and this Court has no power to make any order for restitution against the person to whom the money has been paid " : *Ex parte Manning* (18 N.S.W.R. 324).

The applicant had become surety for such costs as the Supreme Court should order on an appeal to the Supreme Court from the Police Court in respect of a conviction under the Immigration Restriction Act 1901. By consent the appeal was taken direct to the High Court. It was dismissed with costs, which the applicant declined to pay as not being within the terms of his recognisance. The police magistrate, however, declared the recognisance forfeited, and the certificate of forfeiture was entered as a judgment of the Supreme Court. *Held*, that a motion for a prohibition made after the entry of the certificate was too late, there being nothing to prohibit left in the inferior Court : *Ex parte Fangett* (8 W.A.L.R. 195).

After judgment given in the Small Debts Court in a case where there was no jurisdiction in the locality, a warrant of execution was issued and a cheque given to satisfy it, but payment of the cheque was afterwards stopped. An order *nisi* for a prohibition was granted on terms that the applicant paid £18 into Court to abide the result of the motion for prohibition. It was argued that there was nothing to prohibit, as execution had issued and the bailiff held the cheque for the respondent, and *Ex parte Foster* (11 N.S.W.S.C.R. 195) and *Ex parte Medlyn* (9 N.S.W.L.R. 276) were cited. The rule was made absolute, the £18 to be paid out to the applicant : *R. v. Biggenden JJ.* (1908 Q.W.N. 62).

Applicant moved for a prohibition against a Small Debts Court, but it was objected that, as the amount of the verdict had been paid without protest, no prohibition lay. It was argued that the rule did

not apply as there was a total want of jurisdiction. But *Innes, J.* : "The money having been paid in without protest, and paid over to the respondent, there is nothing to prohibit": *Ex parte Hetherington* (4 W.N. 57).

"And so after judgment given and execution awarded in the County or in other Court Baron, which hath not power to hold plea of debt of the sum of forty shillings, &c., or of damages in trespass amounting to such sum, or more, the party defendant shall have a writ of prohibition unto the bailiffs, or unto the sheriff, or officer of the Court, that they do not execution; and if they have distrained the party to make satisfaction, that then they release the distress and that they revoke what they have done therein."—Fitzherbert *Natura Brevium*, Prohibition (46 G.).

Judgment having been given against the defendant, and his goods having been seized, he paid the amount of the judgment and costs under protest, and applied for a prohibition. *Platt, B.* : "In this case the judgment has been executed. There is nothing to which the writ of prohibition can attach. In the case cited from F.N.B. (46a) there was something to be done which might ultimately produce the fruits of execution": *Robinson v. Lenaghan* (2 Ex. at 337; 17 L.J. Ex. 174).

An order had been made against the applicant for payment to R., a trustee for B., of money for the support of the applicant's illegitimate child. The applicant, not having complied with the order, was proceeded against, and the justices ordered imprisonment pending compliance with the order, but no sum was stated in the order as the amount due. The applicant paid the amount actually due under protest to the police clerk, but the clerk paid the moneys to R. without saying anything about the protest, and R., in ignorance thereof, handed the money to B. The applicant sought a prohibition on the ground of the invalidity of the order in not specifying the amount due. *Held*, that the receipt of, and the payment over of the money by R. in good faith, though the prohibition must go, constituted an absolute bar to any proceedings beyond the issue of the writ. So far as R. and B. were concerned the prohibition would be of no avail: *Ex parte Potter* (1 S.C.R. 61).

R. bought alleged stolen goods from D., applicant being the owner. D. was committed for trial for stealing, but the Attorney-General declined to file a bill. A constable had seized the goods under a search warrant issued at the instance of the applicant. After the refusal to file a bill, R. obtained an order from justices under the Police Offences Act that the goods be delivered to him. Applicant obtained a rule on the ground that the justices had no jurisdiction to make the order. It

was argued that it was useless to grant the prohibition, as the constable could hand the goods to R. without any order; the effect of granting a prohibition would not prevent him handing the goods to R. But *Darley, C.J.*: "It appeared to him that it was useless to grant this prohibition, but where a Judge saw that a magistrate had acted without jurisdiction, it was his duty to grant a prohibition, no matter how useless the prohibition might be": *Ex parte Perrott* (15 W.N. 243).

On the hearing of a petition under the Local Elections Act 1904, the magistrate decided in favour of the petitioner, declaring the petitioner elected, and that the election of the respondent was void. A prohibition was granted. *Per Chapman, J.*: "The magistrate's order is now a bar to one person assuming an office, and a shield to another person in retaining it. It is therefore an active order, or judgment, in valid existence on the face of it, but made without jurisdiction, and consequently a writ of prohibition will go to restrain giving effect to it": *Macnamara v. Bell* (26 N.Z.L.R. 1231).

A clergyman had judgment against him by the Court of Arches, and a monition and subsequently an inhibition issued against him, and his benefice was sequestered. He did not at the time know of the facts which ousted the jurisdiction of the Court (*i.e.*, the fact that the bishop who invoked the jurisdiction was disqualified by interest, in that he had the patronage of the living in question). The clergyman applied for a prohibition nine months after sentence, and it was urged that delay defeated his right to a prohibition, but *Mellor and Lush, JJ.*, held that, in the circumstances, the application was not too late "and seeing that the sentence is still in operation and that, if not stayed, it will, or may, end in deprivation, we can see no reason for limiting the right to a prohibition to that stage of the cause (*i.e.*, before hearing)": *Serjeant v. Dale* (2 Q.B.D. 558).

A bishop had inhibited from acting and revoked the license of applicant to officiate as a clergyman. Argued that as the bishop's proceedings had extended to the final and absolute revocation of applicant's license before application was made to the Court for a rule *nisi*, nothing remained for the Court to prohibit. *Hargrave, J.*, at p. 77, says there are three conclusive answers to the objection—(1) the revocation of the license being intended from the first to be and being now the basis of the now pending action of ejectment under the Church Temporalities Act (8 Wm. IV. No. 5), the prohibition will obviously not be without operation, for it will undoubtedly most effectually restrain all further proceedings in such ejectment by this Court's judicial declaration upon this rule that the inhibition and revocation were both illegal and void; (2) the prohibition being asked to restrain the pro-



ceedings on the original inhibition, will, of course, thereby set aside the inhibition as well as all the subsequent proceedings, as illegal and void; (3) this Court will never allow the bishop to maintain his own illegality merely by his having added to such illegality by attempting to close the doors of this Court by the bishop's revoking Mr. Thackeray's license, almost concurrently with his having summoned him to appear and answer an illegal charge thus illegally adjudicated upon by the bishop. Also *Leman v. Goulty* is an answer (3 East 3): *Ex parte Thackeray* (13 S.C.R. 1, at 76).

Applicant (a pound-keeper) was charged with a breach of sec. 21 of Impounding Act 1865, for failure to furnish transcripts of his pound books to the Clerk of Petty Sessions for several successive months. The justices found him guilty and ordered him to be removed from office. *Stephen, C.J.*: "It is quite plain that the enactment to which I have just referred (sec. 2, 11 & 12 Vic. c. 44) applies to a case of this kind. I mean that a prohibition will lie against a bad conviction, simply because it is bad. Is it to be said that a person may be found guilty of an offence by an utterly wrong decision and yet that the magistrate, by abstaining from the infliction of a penalty, can prevent the person convicted from clearing himself from the disgrace? Here the conviction was wrong. The information embraces five different offences, and the sentence deals with the whole of them. There ought to have been five separate informations and the defendant called upon to plead to each. But the justices went further than finding him guilty—they dismissed him from his office. It is true that those who have the power to appoint—*i.e.*, the majority of the justices of the district—have also the power to dismiss. But they cannot dismiss in this summary way. . . . As it is, the conviction is bad and we must hold that the dismissal was illegal. We cannot order the applicant to be reinstated. We cannot say that we shall quash the conviction. We can only say that the magistrates are to be restrained from further proceeding on that conviction. What the consequences of that may be, we need not now enquire": *Ex parte Everingham* (9 S.C.R. 259).

"An application for a rule *nisi* for a writ of prohibition may not be granted after execution has been issued. But if execution takes place after the rule *nisi* has been granted, the Court will grant the writ of prohibition all the same, if the party is entitled to it, and will order restitution": *R. v. Cope*; *In re Moore v. White* (4 A.J.R. at 99). And see *R. v. Carr* (1 A.J.R. 1); *R. v. Call* (2 V.L.R.C.L. 137).

A mining warden struck out a case on non-appearance of applicant, but the Registrar illegally registered the title of his adversary. *Held*, no prohibition lay to the mining warden. "The warden simply struck



the case out of the list and decided nothing . . . There is nothing to prohibit, because no decision was given or order made": *Ex parte King* (15 W.N. 29).

Plaintiff had obtained a verdict in a District Court upon a confession of judgment whereby defendant agreed to pay off the amount at £1 per week. Execution issued before the first instalment was due. A prohibition was granted in Chambers, but on appeal, *Darley*, C.J.: "The Judge below has made no order, and I cannot understand a prohibition going unless some order has been made which the Judge had no jurisdiction to make. To come to this Court and ask for a prohibition simply because a bailiff is doing something he has no right to do is absurd. If goods have been taken which are not leviable, or if execution is levied for an improper amount, or at an improper time, the obvious thing to do is to bring the matter to the notice of the District Court Judge, and if anything is wrong he will set it right. *Ex parte McFee* (9 Ex. 261) has nothing to do with this case. A case which has some reference to this present one is *Ex parte Story* (8 Ex. 195) where it was held that where a Court has jurisdiction over a suit, mere irregularities in the proceedings do not afford any ground for a prohibition. We cannot prohibit something from being done under an order which has never been made: " *Bernstein v. Lynch* (15 W.N. 129).

One Bill purchased shares in a mine from Oliver, and on the same day Oliver signed a transfer. Bill re-sold to Cooke, signed a transfer to him, and also delivered to him the transfer from Oliver, that they might be delivered to the secretary Charles, and registered, but the latter refused to register, as a foreign attachment from the Mayor's Court bound him to keep in his hands all goods, &c., of Oliver. Bill applied for a prohibition on the ground that the shares could not legally be attached, as (*inter alia*) the parties were not within the jurisdiction. But *Martin*, B.: "Suppose on a *fi. fa.* an estate in fee simple is seized by the sheriff, would this Court interfere?" *Counsel*: "The proceedings of the Mayor's Court are anomalous. Here is a notice of attachment from the officer of the Court served upon the person; that can only be intended to apply to the shares." *Martin*, B.: "The person may have goods and chattels in his possession. What is it we are to restrain? In fact, it is Charles alone, whose act in applying the attachment to the shares is complained of." Rule refused: *Tredinnick v. Oliver* (29 L.J. Ex. 466).

On 19th May, 1891, the respondents (eight holders of publicans' licenses) brought this action claiming a writ of prohibition and an injunction restraining the committee from adjudicating upon the respondents' applications for renewals of licenses, on the ground that the com-

mittee, prior to their election, promised that if elected they would grant no renewals. The meeting for granting renewals was fixed for 3rd June, but was adjourned pending the decision of the Supreme Court. On 9th June, *Denniston, J.*, made an order restraining the committee from refusing the licenses for the reason only that the licenses were not required by the majority of ratepayers. In March, 1892, the committee appealed from this order, and the publicans gave notice of cross-appeal, claiming prohibition or injunction on the same ground that they had previously urged, and claiming *certiorari* in the alternative. After the decision by *Denniston, J.*, the committee held the meeting and granted three out of the eight applications; they refused the other five, professing to carry out the principle which in the order it was declared they ought to act upon. At the hearing of the appeal, counsel desired that the cross-appeal should be treated as on behalf of those applicants only whose renewals had been refused. *Prendergast, C.J.*: "The position of these five is that after the order was made they appeared before the committee, and, so far as appears to this Court, the committee acted upon the view of the case declared by the Supreme Court. Now they ask to prohibit the Court from proceeding upon these applications. I think there is now, however, nothing to prohibit or restrain": *Isitt (The Sydenham Licensing Committee) v. Taylor* (10 N.Z.L.R. 646).

The applicant proceeded against his servant in the Court of Petty Sessions under the Master and Servants Act, 20 Vic. No. 28, sec. 4, for abandoning certain sheep. The magistrate dismissed the case. *Stephen, C.J.*: "Inasmuch as this case was dismissed, I do not see how a prohibition can go. There is nothing to prohibit—no order has been made": *Ex parte Schneider* (11 S.C.R. 100).

A complainant's case in the Small Debts Court was dismissed with costs. On application for a common law prohibition, it was objected that there was nothing to prohibit, and *Re Schneider* (11 S.C.R. 100) was cited. *Held*, that this case was different, as a verdict was given for defendant, and complainant ordered to pay costs: *In re O'Lachlan* (3 W.N. 54).

An information laid by applicant was dismissed, and he was ordered to pay certain costs and witnesses' expenses. *Pring, J.*, stated that he doubted very much whether, in this case, there was anything to prohibit: *Ex parte Dawson* (20 W.N. 206).

A case was struck out in a Local Court, no order being made as to costs. The clerk taxed defendant's costs and execution was issued therefor. The magistrate, on being applied to, had refused to review the taxation. The plaintiff applied for a prohibition to restrain the

execution for costs, but a rule was refused by the Court—*Hanson*, C.J., *Gwynne* and *Wearing*, JJ.: “There was original jurisdiction in the magistrate in the subject matter of the suit, and a prohibition will not lie in a collateral proceeding such as the taxation of costs”: *Whiting v. White* (2 S.A.L.R. 13).

A. applied to a Licensing Court for permission to extend his licensed premises, and the Court granted the application. *Held*, that the order was a mere nullity, and therefore there was nothing to prohibit: *Ex parte Ardill* (19 W.N. 107). But see *Bourke v. McGrath* (12 W.N. 12).

“If the Judge had no jurisdiction to grant the order for protection, it is a nullity, and you do not want a prohibition; and supposing that the creditor goes on and takes the petitioner in execution, the order for protection will not avail him in an action of trespass. Prohibition is usually granted where the decision of the inferior Court will injuriously affect the interests of the party applying for it; it will not do so if the decision is a nullity; and this order is simply for the protection of the petitioner”: *Wightman*, J.: *Re Tamerlane Bowen* (15 Jur. (O.S.) 1196).

The holder of an accommodation license applied for a renewal (The Licensing Act 1881, secs. 32, 79). The Licensing Committee, without any formal objection having been made, and without giving the applicant any notice of an objection or the option of applying for an adjournment, granted the renewal, subject to the condition that the licensee transfer the license within three months to some approved person. This condition was not authorised by law. *Denniston*, J.: “In attaching an unwarrantable condition they acted without jurisdiction. I think, as to that excess, the applicant is entitled to prohibition. It is no answer to say that if the condition were illegal the committee would be bound to ignore it. That would be an answer to all motions for prohibition for excess of jurisdiction. In such cases the Court acts on the assumption that the legal proceedings will be duly followed up unless the Court interferes. The case of *Isitt v. Taylor* is altogether different. There the judicial body had done nothing and it was held that the Court could not anticipate that it would act improperly”: *Whittle v. Bishop* (13 N.Z.L.R. 670).

Where a warrant of possession under a County Court judgment, given without jurisdiction, was executed the day after a rule *nisi* for a prohibition had been obtained, and the day before it was served on the Judge, *held* that it was not too late. *Per Patteson*, J.: “As to the question of time, the rule was obtained before the possession was given under the judgment, and defendant came as soon as possible. I think that as there was a total want of jurisdiction, the rule should be made

absolute." Upon a subsequent application, the rule was drawn up with a clause commanding restitution, which the Master had objected to insert as it had not been mentioned in the rule *nisi*: *Jones v. Owen* (18 L.J.Q.B. 8; 5 D. & L. 669).

On 24th April, a magistrate gave a verdict for plaintiff, having no jurisdiction owing to non-compliance by plaintiff with a mandatory condition precedent. On the same day a warrant of distress was issued against defendant's goods. On 8th May, the plaintiff saw a telegram from the magistrate's clerk that the debt and costs had been levied. The rule *nisi* was granted on 5th May, and on 11th May: "The rule must therefore be made absolute and the writ may contain a clause for restitution as in *Jones v. Owen* (18 L.J.Q.B. 8). It is not clear that the levy has not been made since the rule *nisi* was granted":—*Chapman, J.*: *Howorth v. McBeath* (2 Macassey 653). [His Honour apparently thought in this case that it was for respondent to show that the levy was completed before the granting of the rule *nisi*. On this point, contrast *per Williams, J.*, in *McGregor v. Beswick* (N.Z.L.R. 3 S.C. 83).]

A. imported goods, paid the duty, and sold the goods to B. The Customs authorities claimed higher duty and directed the goods to be seized, and the justices made an order for forfeiture under Customs Duties Act No. 306, sec. 8, the summons having been served only on A. On motion for a common law prohibition, it was objected that the justices' functions had ceased, and that there was nothing further for them to do that the Court could prohibit, but *Fellows, J.*: "I don't see how that affects the matter. There may be restitution ordered." It was then argued that the goods being then at the disposal of the Governor in Council, the case had passed from the jurisdiction of the justices and there was no person against whom a restitution order could be made. *Fellows, J.*: "Yes, there is the seizing officer." *Counsel*: "The seizing officer has not got the goods, they are at the disposal of the Governor in Council." *Fellows, J.*: "Yes, if they have been rightly condemned." A writ of prohibition was issued, but an order for restitution was refused because the Customs authorities could issue another summons: *R. v. Call*; *Ex parte Callaghan* (5 A.J.R. 91).

Money had been paid into the Magistrate's Court to abide the event of a rehearing. The rehearing was refused and the money paid out to the successful party, though the other party had telegraphed the Court not to pay out. The defendant applied for a prohibition on the ground of a defect of jurisdiction apparent on the face of the proceedings. It was argued that the Court, under the new rules, could cause a restitution clause to be inserted where the money had been wrongfully paid out

and order the person to whom it was paid to restore it. *Williams, J.* : “ I do not think that the new practice enlarges the remedy by prohibition. If, therefore, in any case, execution has been levied and the money not paid out of Court, a restitution clause may be inserted in the writ, but I never heard of a case where a prohibition was granted after the money had been paid out of Court. In any event it rests with the applicant to show that the money has not been paid out : ” *McGregor v. Beswick* (N.Z.L.R. 3 S.C. 83).

Applicant was in gaol, having been convicted upon an information which on its face showed that the offence charged had been committed more than six months before the information was laid. Upon motion for a prohibition, objection was made that the Court could not by this proceeding deliver the applicant out of prison—“ We incline to think from the passage quoted by *Baron Alderson* (in *Roberts v. Humby*, 3 M. & W. at 127) from the 2nd Institute 602, that we must have the power to do so. It is unnecessary, however, now to decide that point. We are of opinion that the rule must be discharged (*scil.* the prosecutor not being a party to it) . . . . As the prisoner is illegally in custody we should hope that some steps may be taken to procure his discharge without compelling him to apply to this Court again. The most usual course to quash the conviction is by *certiorari* or *habeas*. *Ex parte Higgins* (10 Jur. 838) is a precedent for prohibition, but, as that only lies where the Court has acted without jurisdiction, the question may arise whether the limitation as to time (*i.e.*, whether the complaint was made within six months of the committing of the offence) is not rather a matter of defence than as destroying jurisdiction ” : *Ex parte Davis* (Legge 1505).



CHAPTER X.

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FROM WHAT COURTS THE WRIT  
ISSUES.

“ By Rot. Parl. 18 Ed. I., the Chancellor and Chief Justice have power to determine what pleas ought to be prohibited in causes ecclesiastical : 2 Rol. 316. H. And, therefore, a prohibition to the spiritual Court may be granted by the Chancery : F.N.B. 40. N. So, C.B. may grant a prohibition : 2 Rol. 317, l. 5, 10 ; R. 12 Co. 59. And the Exchequer : Adm. Ca. Parl. 58. R. Pal. 526. Though no plea be depending there of such matter : 2 Rol. 317, l. 5.”—Comyn’s Digest, Prohibition (B.).

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“ The superior Courts have a general power of supervision over all inferior Courts, and it is their duty to keep such inferior Courts within the limits of their jurisdiction, so that it may be laid down as a general rule that, whenever a Judge of an inferior Court has exceeded his authority, it is competent for either of the superior Courts at Westminster to grant a prohibition. There are numerous instances both in ancient and modern times of this power having been exercised by each of the three common law Courts (see Comyn’s Digest, tit. Prohibition (B.) ; Bacon’s Abr., tit. Prohibition (A.) ). The Court of Chancery has also from time to time interfered by Prohibition, especially with Ecclesiastical Courts (F.N.B. 40). And the power of this Court in that respect seems to be equally extensive with that of the superior Courts of common law, though its exercise has been chiefly confined to cases

arising in the spiritual Courts. The reason for this seems to be that most of the inferior Courts are Courts of common law and are, therefore, more properly superintended by the superior Courts of common law than by the Courts of Equity. There are cases, however, in which the Court of Chancery may with great propriety interpose, as, for instance, if a Judge of one of the new County Courts were to entertain a plaint brought to recover a legacy above £20, or in which the validity of a bequest came in question, or if he exceeded his jurisdiction in any action brought by one partner against another, or any other case in which a Judge of an inferior Court trespasses on the general jurisdiction of the Courts of Equity.”—Lloyd’s Treatise on Prohibition, pp. 3, 4.

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“And be it further enacted that the said Courts respectively (*i.e.*, the Courts constituted as ‘The Supreme Court of New South Wales’ and ‘The Supreme Court of Van Diemen’s Land’—sec. 1 of 9 Geo. IV. ch. 83) shall be Courts of record and shall have cognisance of all pleas civil criminal or mixed and jurisdiction in all cases whatsoever as fully and amply to all intents and purposes in New South Wales and Van Diemen’s Land respectively and all and every the islands and territories which now are or hereafter may be subject to or dependent upon the respective Governments thereof as His Majesty’s Courts of King’s Bench Common Pleas and Exchequer at Westminster or either of them lawfully have or hath in England . . . .”—Statute 9 Geo. IV. ch. 83, sec. 3. And see as to Victoria Supreme Court Act 1890 (No. 1142) sec. 18.

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“And be it further enacted that the said Supreme Courts respectively shall be Courts of Equity in New South Wales and Van Diemen’s Land and the dependencies thereof respectively and shall have power and authority

to administer justice and to do exercise and perform all such acts matters and things necessary for the due execution of such equitable jurisdiction as the Lord High Chancellor of Great Britain can or lawfully may within the realm of England and all such acts matters and things as can or may be done by the said Lord High Chancellor within the realm of England in the exercise of the common law jurisdiction to him belonging.”—Statute 9 Geo. IV. ch. 83, sec. 11. And see as to Victoria Supreme Court Act 1890 (No. 1142) sec. 19.

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Sec. 75, Commonwealth of Australia Constitution Act (63 & 64 Vic. c. 12).—In all matters . . . . .

(v.) in which a writ of . . . prohibition . . . is sought against an officer of the Commonwealth the High Court shall have original jurisdiction.

Sec. 33 Judiciary Act, 1903 No. 6.—(1) The High Court may make orders or direct the issue of writs

. . . . .

(b) requiring any Court to abstain from the exercise of any federal jurisdiction which it does not possess.

Sec. 38 Judiciary Act, 1903 No. 6.—The jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters

. . . . .

(e) Matters in which a writ of . . . prohibition is sought against an officer of the Commonwealth or a federal Court.

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“ Now I very much doubt whether a writ of prohibition at common law can be granted by a State Court, even though temporarily invested with federal jurisdiction to hear an appeal, against an inferior Court also invested temporarily with federal jurisdiction. The law is thus laid down in Bacon’s Abridgement, sub. tit. Prohibition,

p. 564: ‘As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown and the administration of justice is committed to a great variety of Courts, hence it has been the care of the Crown that these Courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed; which issues out of the superior Courts of common law to restrain inferior Courts, whether such Courts be temporal, ecclesiastical, maritime, military, &c., upon a suggestion that cognisance of the matter belongs not to such Courts; and in case they exceed their jurisdiction, the officer who executes the sentence, and in some cases the Judges who give it, are in such superior Courts punishable.’ It appears to me that the duty of keeping Federal Courts, or Courts invested with federal jurisdiction, within their respective jurisdictions, must devolve on the Federal High Court alone, in which the judicial power of the Commonwealth in its plenitude is vested, and cannot be performed by a State Court invested with federal jurisdiction only to the extent necessary to hear appeals. But it is not necessary to decide this point, because the prohibition we are asked to grant is a statutory prohibition.”—*Owen, J.*, in *Ex parte Oesselmann* (2 S.R. at 153, 154). (See now Commonwealth Judiciary Act, 1903 No. 6, sec. 38, &c.).

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“It has become necessary to refer to the case of *Ex parte Stelling* (4 S.R. 201). The judgment in that case was founded on sec. 38 (e) of the Judiciary Act 1903, which provides that the High Court shall have exclusive jurisdiction in ‘matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal Court.’ The learned Judge appears to have considered that the word ‘prohibition’ was there used in

such a sense as to include a form of appeal in New South Wales which goes by that name. But I have no doubt that in the Judiciary Act 1903 the writ of prohibition referred to is the prerogative writ by which the superior Courts control inferior Courts from going beyond their jurisdiction, and does not include the writ which is called by that name in New South Wales, but which is in reality only a form of appeal. I therefore think that sec. 38 does not apply. The jurisdiction of *Pring, J.*, to hear the appeal was settled in the case of *Ah Yick v. Lehmert* (2 C.L.R. 593).” *Held*, therefore, that a Judge in Chambers sitting for the Supreme Court of New South Wales may, under sec. 114 of the Justices Act 1902, and sec. 137 of the Excise Act 1901, grant a statutory prohibition to restrain justices from proceeding on a conviction under the Excise Act: *Wilcox v. Donohoe* (3 C.L.R. 83). [In Victoria an order to review could therefore be granted.]

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NOTE I.:—The following table shows the respective jurisdictions of the High Court and the State Court to grant common law prohibition:—

A. Purely State Courts—the writ may be granted by the Supreme Court.

B. State Courts exercising federal jurisdiction—

(a) Where the writ is not sought against an officer of the Commonwealth, the writ may be granted either by the High Court (sec. 33 Judiciary Act, 1903 No. 6), or (*semble*) by the Supreme Court [secs. 38 (e), 39 (2), and see *Ah Yick v. Lehmert* (2 C.L.R. 593; 11 A.L.R. 306)].

(b) Where the writ is sought against an officer of the Commonwealth, the writ may be granted by the High Court alone [63 and 64 Vic. c. 12, sec. 75 (v), Judiciary Act, 1903 No. 6, sec. 38 (e)].

C. Federal Courts—the writ may be granted by the



High Court alone (sec. 38 (e), Judiciary Act, 1903 No. 6).

II.—By the Commonwealth Acts Interpretation Act, 1901 No. 2, sec. 26, “Federal Court” means the High Court or any Court created by the Parliament; “Court exercising federal jurisdiction” means any Court when exercising federal jurisdiction and includes Federal Courts.

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The Grand Sessions of North Wales might grant a prohibition to the spiritual Court there: *Winn’s Case* (1 Sid. 92).

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So the Courts of Law of Chester may grant a prohibition to the spiritual Court there if it exceeds its jurisdiction: 2 Rol. 318, l. 5.

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“If one be sued in an inferior Court for a matter out of the jurisdiction, the defendant may either have a prohibition from one of the common Law Courts of Westminster Hall, or in regard this may happen in vacation, when only the Court of Chancery is open, he may move that Court for a prohibition, but then it must appear by oath made that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused. And if a prohibition has been granted out of Chancery *improvide* and without these circumstances attending it, the Court will grant a supersedeas thereto. But in case it shall appear on the face of the declaration that the matter is out of the jurisdiction of the Court, then a prohibition will be granted without oath of having tendered the foreign plea and in these cases equity imitates the common law”: *Anon.* (1 P. Wms. 476).

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Although the Court of Chancery may have jurisdiction to grant a prohibition, the proper course is, during term

time, to apply to one of the Courts of common law : *In re Michael Foster* (24 Beav. 428 ; 3 Jur. N.S. 1238).

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*Semble*, the Chancery Court has jurisdiction to issue a prohibition to the Lord Mayor's Court : *Jacobs v. Friedburg* (21 W.R. 353).

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The Consistory Court was proceeding to try a matter over which they had no jurisdiction. Application was made to the Chancery Court for a prohibition on the ground that a prohibition could only be obtained at common law during term time (*In re Foster*, 24 Beav. 428), and that Hilary Term had expired before the applicant could move. A prohibition was granted absolute in the first instance (*In re Magor*, T. & R. 314)—the practice appears to have been to grant an order absolute at once, leaving it to the parties affected to move to dissolve it : *In re Bateman* (L.R. 9 Eq. 660).

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[NOTE.—The Supreme Court of Victoria was constituted a separate Court from the Supreme Court of New South Wales by virtue of the Imperial Statute, 13 & 14 Vic. c. 59 and the Colonial Statute 15 Vic. No. 10. It possesses, as does the Supreme Court of New South Wales, all the common law powers of the old Courts of King's Bench, Common Pleas and Exchequer, and of the Lord High Chancellor. See Supreme Court Act 1890 (No. 1142), secs. 18, 19.]

## CHAPTER XI.

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**TO WHAT COURTS THE WRIT ISSUES  
AND IN RESPECT OF WHAT PRO-  
CEEDINGS.**

Prohibition lies to an individual or a body of individuals (not being a superior Court) acting, or assuming to act, as a Court.

But the writ only issues in respect of proceedings which are in their nature judicial.

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“In Bacon’s Abridgement, Prohibition, it is stated that ‘The writ of prohibition was framed to keep the various Courts within the limits of their several jurisdictions, and issues out of the superior Courts to restrain inferior Courts’ upon a suggestion that the cognisance of the matter belongs not to such Courts. There then follows (letter I.) an enumeration of the Courts to which a prohibition may be awarded, among which is included a ‘pretended Court.’ The like enumeration appears in Com. Dig., Prohibition (A. 1), where it is stated that the writ will lie ‘to a Court by usurpation without lawful authority.’ In every case the writ is to a Court or a pretended Court. It cannot be issued to restrain merely illegal or unauthorised acts. Those acts must be done by an individual or body of individuals acting, or assuming to act, as a Court, to justify a superior Court in issuing a prohibition. . . . It can never issue to any individual not acting judicially, no matter what temporal or secular rights may be affected by his decision.”—*Martin*, C.J., in *Ex parte Thackeray* (13 S.C.R. at 50).

*Martin*, C.J., held that the bishop was merely conducting an inquiry and not holding a Court, but *Hargrave* and *Cheeke*, JJ., dissented from this view, the latter of whom said (at p. 96): "The only further remaining question is whether the meeting *in foro domestico* convened and holden by the bishop at his own residence, can be legally considered a Court against the proceedings of which a prohibition can issue. Upon this point I entertain, and must express, some doubt and embarrassment. Still, as the bishop issued his summons, citing Mr. *Thackeray* to appear before him—that he did appear by his counsel and attorney—the bishop not merely in form but substantially the prosecutor . . . presided—that he was assisted by the presence of his own chaplain, his attorney and one of the churchwardens: that the question applicable to the position of Mr. *Thackeray* was *ex parte* duly considered; and finally, that the judgment was pronounced by the bishop in form and notice of the sentence given. The conclusion I have arrived at, therefore, is, under authority of the judgment in *Long v. The Bishop of Capetown* (1 Moo. P.C.N.S. 461 to 468), that in principle of that decision a Court was so constituted. Under the recent decision of *Dawkins v. Lord Rokeby* (L.R. 8 Q.B. 255) the same principle is distinctly adopted in the judgment pronounced by the Chief Justice 'that although a Court Martial was a Court of inquiry, not a Court of law, a Court of record, or a Court of justice, still such points of inquiry possessed the qualities of a Court of Justice.' *Ex parte Thackeray* (13 S.C.R. 1).

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"I am clearly of opinion that the (Marine) Board forms such a Court to which a prohibition will issue. It has all the elements of a Court—the power of summoning parties and witnesses and punishing them if they disobeyed the summons, of hearing evidence on oath administered, and of deciding questions which might deprive persons

of civil rights.”—*Martin*, C.J., in *Ex parte Dalton* (14 S.C.R. 277).

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“ The inquiry is one upon which evidence can be taken on oath, to which witnesses can be summoned, and of which the decision involves discretion. All this shows that the act sought to be prohibited is not a ministerial one, and Dr. Webb argues that it is, therefore, judicial. This is, with profound respect for him, a fallacy. In my opinion the proceeding is neither ministerial nor judicial, but quasi-legislative—that is, a proceeding towards legislation. Before the statutes in reference to provisional orders, the only mode of obtaining a local and personal Act was by the promoters introducing into and passing through Parliament a local and personal bill. This bill was referred to a Select Committee, who summoned witnesses, examined them on oath, and arrived at a determination which involved discretion. This proceeding was not judicial, and the body before which it was conducted was not a Court. The statute before us is one of a series which delegated to a body outside Parliament the power and duty of making preliminary inquiries in relation to applications for certain intended local and personal bills, and in certain events to make provisional orders in reference to them, but it expressly declared ‘ that any such order should be of no force whatever unless and until it was confirmed by Parliament ’ (sec. 214 sub-sec. 3, Public Health (Ireland) Act 1878). Such a ‘ provisional order ’ does not impose an obligation upon anyone. It has no validity *per se*. The only right it confers (if, indeed, it can be called a right) is not a right against any person. It is nothing more than to have a bill introduced into Parliament under one procedure instead of another. . . . In my opinion, such an order is not a ‘ determination ’ sufficient to erect into a Court the body empowered to make it, and to such a body, not being a Court, the writ of



prohibition cannot go. . . . As to the judgment of *Brett*, M.R., in *Reg. v. The Local Government Board* (10 Q.B.D. 317), so strongly relied upon by Dr. Webb in support of his application, it appears to me to be an authority against him. I shall read it without note or comment: 'I think,' says the Master of the Rolls, 'I am entitled to say this, that my view of the power of prohibition at the present day is this, that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation on individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.' The words which I have emphasised, viz., 'the power of imposing obligations on individuals' appear to me to be no more than a cautious and, if I be permitted to say so, an accurate description of the nature of the body to which, at common law, the writ of prohibition is permitted to go. He does not say 'any inferior Court,' which perhaps would not very accurately define what he meant when dealing with the Local Government Board, which, in the exercise of some of its functions, is a Court, but he translates the word 'Court' and gives it its legal definition—'a body of persons other than superior Courts that have the power of imposing an obligation upon individuals.'"—*Palles*, C.B., in *In re Local Government Board; Ex parte Kingstown Commissioners* (16 L.R. (Ireland) 150).

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"It is, I believe, correctly stated by *Palles*, C.B., in *R. v. Local Government Board* ([1902] 2 Ir. R. at p. 373), that 'to erect a tribunal into a 'Court' or 'jurisdiction' so as to make its determinations judicial, the essential element is that it should have power by its determination within jurisdiction to impose liability or affect rights.'

‘By this,’ said the learned C.B., ‘I mean that the liability is imposed or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depend upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorising it is judicial.’ There we get a modern use of the term ‘judicial power.’”—*Isaacs, J.*, in *Huddart Parker & Co. Prop., Ltd. v. Moorehead* (15 A.L.R. at 260).

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“I see nothing here like an attempt to assume powers which do not exist. Nothing more has been done by the parties against whom this particular application is made than to enforce upon the young men under their charge (*i.e.*, Cambridge University students) a regulation which is quite within the competence of the governing body of a place of education. It is contended that the proceeding was judicial because there was a meeting, a notice to the present applicant, and a complaint depending; and therefore that he had a right to be heard. But we must look to the substance of the proceeding. The Heads of the University took these steps, desiring to enforce a sumptuary regulation, but wishing not to allow this party to be injured without an opportunity of showing that he ought not to be affected by it. That does not give him the rights which he now claims.”—*Coleridge, J.*, in *Ex parte Death* (18 Q.B., at 659, 660).

“ If these proceedings had been as wrong as I think they were right and useful, I should be unwilling to interpose. The steps which were taken are not judicial because a decree and a summons form part of them. The summons amounted to no more than saying, ‘ We wish to hear you before we do that which will be to your prejudice.’ Such a notice does not turn the proceeding into a judicial one” : *Crompton, J., in Ex parte Death* (18 Q.B., at 660).

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It appears by the register, a prohibition granted by this Court to the Court of Exchequer. If they hold plea of common pleas without a writ of privilege, as appears *inter brevia de Statuto*, if deal against statutes, prohibition to a Justice of Assize to be granted *quia magna indiget examinatione* ; this is the Act of Parliament. And so if the Judges of C.B. do hold plea of an appeal, a prohibition is to be granted by this Court, as register ; the statute of 2 H. 5, by which a libel is to be delivered to the party, where need shall be, where a statute doth prohibit *malum prohibitum* to be prohibited. We here in this Court may prohibit any Court whatsoever, if they transgress and exceed their jurisdiction. And there is not any Court in Westminster Hall but may be by us here prohibited, if they do exceed their jurisdictions, and all this is clear and without any question : *Warner v. Suckerman* (3 Bulst. 119 ; 1 Ro. Rep. 252 ; 1 Ro. Abr. 381, 382 ; 2 Ro. Abr. 317, 318).

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*Note.*—As to the issue of the writ to Federal Courts and Courts exercising federal jurisdiction, by the High Court or the Supreme Court, see Part I., Chapter X., p. 413 *et seq.*

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As to what constitutes a superior and what an inferior Court, and how far it is necessary to show jurisdiction on

the face of the documents in each case, see *Ex parte Fernandez* (10 C.B.N.S. 3).

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*Illustrations.*

1. Courts, p. 424.
  2. Proceedings, p. 432.
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1. *Courts.*

The Industrial Arbitration Court (1901 No. 59) was a Court of limited statutory jurisdiction and prohibition lay to restrain it from acting in excess of its jurisdiction: *Ex parte The Caterers & Restaurant Keepers' Association* (3 S.R. 19); *Clancy v. Butchers' Shop Employees' Union* (1 C.L.R. 181).

" . . . as the Admiralty is acting beyond its jurisdiction, prohibition will go; for the Court is one of limited jurisdiction. I do not call it an inferior Court, but, treating it as a superior Court with limited jurisdiction, it is subject to prohibition though superior in name, like many other Courts, nominally superior, but still liable to prohibition, their jurisdiction being limited."—*Willes, J.*, in *James v. South Western Railway Co.* (L.R. 7 Ex. at 290).

*Quære*, whether a prohibition will issue to the Lord Chancellor sitting in bankruptcy: *Ex parte Cowan* (3 B. & Ald. 123).

*Stephen, C.J.* (before the passing of 38 Vic. No. 1), on motion for prohibition to the Chief Commissioner in Insolvency, had rescinded the order of the Chief Commissioner and treated the matter as virtually an appeal. "We did not say that a prohibition would not lie; but I suggested that the order should be rescinded, so that any question as to the nature of the Chief Commissioner's jurisdiction as a branch of this Court might be avoided. However, as he acted here as a Court without jurisdiction, the prohibition may go. I have some doubt myself whether that is the proper form our order should take; but the point is immaterial": *In re Frost* (10 S.C.R. 187). And see *In re McIlveen* (10 S.C.R. 192n.).

By 38 Vic. No. 1, sec. 1, "The insolvency jurisdiction of the Supreme Court, or of a Judge thereof, shall continue to be exercised as a superior Court of Record of Law and Equity." The powers which were to continue to be exercised were defined in 25 Vic. No. 8, whereby the Chief Commissioner acted "for and on behalf of the Supreme Court or a Judge thereof." Though *Hargrave, J.*, thought a prohibition

would lie. *Martin*, C.J., and *Faucett* doubted this, as the Insolvency Court was apparently made a superior Court, and prohibition goes only to inferior Courts : *Ex parte Sempill* (14 S.C.R. 164).

A debtor summons had issued against applicant, but a copy only was served : the debtor had applied to the Insolvency Court to dismiss the summons on that ground, but unsuccessfully. A prohibition was sought against the Insolvency Court—but the Court held that there was “a remedy by appeal, and it is much better that recourse should be had to that remedy than that we should be called upon to decide the grave question whether we can or cannot issue a writ of prohibition to a Judge of that Court.” An order *nisi* was refused : *Ex parte M. S. Levy* (1 V.L.R.C.L. 271).

A prohibition was granted to the Court of Insolvency—that Court has no jurisdiction under Insolvency Statute 1871 to order a witness summoned before it for examination under secs. 132–134 to pay costs : *In re Sinclair* ; *Ex parte Watson* (15 V.L.R. 736). [See No. 1102, Part VII.]

*Quære*, whether a prohibition lay to the Court of Chancery : *King v. Welby* (Sir T. Raym. 227 ; 3 Keb. 221).

Prohibition to Commissioners of Excise Appeal : *Breedon v. Gill* (5 Mod. 272).

No objection being taken, a prohibition went to restrain the Commissioners of Tithe Commutation from determining the boundaries of parishes, but the Court intimated a doubt as to whether prohibition was the appropriate remedy : *Re Ystradgunlais Tithe Commutation* (8 Q.B. 32).

*Quære*, whether the Irish Land Commission is a Court of inferior jurisdiction and subject to be restrained by prohibition : *Ex parte Hutchinson* (12 L.R. (Ir.) 79). But in *In re Irish Land Commission* (14 L.R. (Ir.) at 93), *Dourse*, B., was clearly of opinion that prohibition lay to that body.

A corporation presented a petition to the Local Government Board praying it to amend certain Acts. A prohibition being sought against the Board on the ground that it had no jurisdiction to amend the Act, it was held that they had such power. But the Court—following *R. v. Hastings Local Board of Health* (6 B. & S. 401)—inclined to the view that the Local Government Board, in exercising its functions as to provisional orders, is not a “Court,” nor are purely legislative powers, or powers of promoting legislation, on principle, subject to prohibition ; but an usurpation of jurisdiction of a judicial character by the Board might be prohibited : *In re Local Government Board* ; *Ex parte Kingstown Commissioners* (18 L.R. (Ir.) 509) .

The Assessor of the Court of Passage at Liverpool had power by



statute to make rules as to practice and costs. A prohibition was granted to restrain him from proceeding on an order made under a rule purporting to be framed under, but not warranted by, the terms of the statute : *R. v. Mayor, &c., of Liverpool* (18 Q.B.D. 510).

Prohibition granted to the Duchy Court : *Warner v. Suckermann* (3 Bulst. 119 ; 1 Ro. Rep. 252 ; 1 Ro. Abr. 381, 282 ; 2 Ro. Abr. 317, 318).

*Seemle*, no prohibition lay to the County Palatine of Chester, for there *breve domini Regis non currit* : *Vaudry v. Pannel* (3 Bulst. 116 ; 1 Ro. Rep. 246).

Prohibition to the Stannary Court : *Palmer v. Cornuay* (2 Rolle 253) ; *Anon.* (2 Rolle 379).

Prohibition to the Court of Marches : *Gibbs v. Cann* (1 Rolle 83) ; *Pasloe v. ———* (1 Rolle 190) ; *Anon.* (2 Rolle 327).

To the Court of Requests : *Jewell v. Horwood* (1 Rolle 263).

Prohibition sought to the Court of Honour. *Holt*, C.J., doubted whether there was or could be any such Court, but said a prohibition would lie to a pretended Court . . . and a prohibition went : *Chambers v. Jennings* (2 Salk. 553).

The plaintiffs libelled in the Court of Honour against the defendant for encroaching on their rights as heralds. It was argued that no prohibition lay to this Court. *Curia.* : Here is no complaint of anything done against the rules of honour and therefore this matter cannot be determined unless a prohibition be granted and the other side demur to the suggestion. Many prohibitions have been granted in cases of like nature, as to the Duchy Court in matters of Equity. And so a prohibition was granted in this case : *Russel's Case* (4 Mod. 128).

“ If they had no jurisdiction they assumed to act as a Court and therefore formed a pretended Court.” The applicant had excluded the bishop from his church, and was cited by the chancellor of the diocese to appear before him and undergo the visitation of the bishop. A prohibition was granted commanding the bishop not to proceed, and the chancellor not to hold plea upon certain accusations preferred by the bishop against the applicant as intimated in the citation issued to the applicant. It was argued that there was no Court or pretended Court, but merely a body of persons met together to conduct a private enquiry, and that, therefore, no prohibition lay. *Wise*, J. : “ Though a prohibition is not granted *quia timet*, I think the Court is bound to look, if it can, at the substance of the proceedings as discoverable from the affidavits on both sides.” *Held*, that the body sought to be prohibited was a pretended Court : *Ex parte King* (Legge 1307).

Cf. *Ex parte Thackeray* (13 S.C.R. 1, 250), and *Thomas v. Hayward* (9 W.A.L.R. 212).

A prohibition was sought against an order of the Presbyterian General Assembly depriving the applicant of his right to act as a minister. *Darley, C.J.*: "The churches in this colony all stand on the same footing; they are voluntary associations and governed by their own laws, and if a member of any church commits a breach of the laws of that church, he is amenable to them in Courts which the church has established; but such Courts are in no sense Courts to which a prohibition will go. . . . We have no jurisdiction to grant a prohibition to this tribunal. We have no more jurisdiction over it than we should have over the board of directors of a company who had dismissed a servant": *Ex parte Hay* (18 N.S.W.R. 206).

"This Court (*i.e.*, a Court Martial) being established in this country by positive law, the proceedings of it and the relation in which it will stand to the Courts at Westminster Hall, must depend upon the same rules with all other Courts which are instituted and have particular powers given them, and whose acts therefore may become the subject of application to the Courts of Westminster Hall for a prohibition. Naval Courts Martial, military Courts Martial, Courts of Admiralty, Courts of Prize, are all liable to the controlling authority which the Courts of Westminster Hall have from time to time exercised for the purpose of preventing them from exceeding the jurisdiction given to them; the general ground of prohibition being an excess of jurisdiction when they assume a power to act in matters not within their cognisance."—*Lord Loughborough* in *Grant v. Gould* (2 H. Bl. at 100).

A prohibition was granted to restrain an improperly convened Court Martial from proceeding to try the applicant for an offence under the Military and Naval Forces Regulation Act (34 Vic. No. 19): *Ex parte Webster* (10 N.S.W.L.R. 79).

"Both the Local Land Board and the Minister, when adjudicating on matters brought before them in Court, form Courts to which a writ of prohibition may go. By the 14th sec. of the Act (Crown Lands Act 1884), sub-sec. 1, the Board is to hear and determine all complaints and other matters brought before it as sitting in open Court; and again, by sec. 18, appeals to the Minister shall be heard and determined as in open Court, and his decision . . . shall be final and conclusive. These Courts so constituted have no jurisdiction beyond that conferred upon them by the Act, and accordingly, if they attempt to act without jurisdiction, they are Courts which can be restrained by writ of prohibition issuing out of this Court, this Court having jurisdiction to grant prohibition to every description of Court exercising judicial functions,

or to a pretended Court : *Ex parte Browne* (9 N.S.W.R. 102 ; 4 W.N. 184). And see *In re Black* (12 N.S.W.R. 37 ; 7 W.N. 145).

A Land Board held an enquiry under reference from the Minister. On application to restrain the Board and the Minister from proceeding with the reference, *held*, that no prohibition would lie to the Minister, as he was not a Court. It was argued that a prohibition would lie to prevent him acting on the decision of a Court, but *held* " prohibition only goes to a Court or a pretended Court " : *Ex parte Bennett* (19 N.S.W.R. 139).

Prohibition lay to the Marine Board " if they exceeded the jurisdiction vested in them as a Court " : *Ex parte Webber* (7 N.S.W.R. 317) ; *Ex parte Dalton* (14 S.C.R. 277).

It was *held* on application for a prohibition, that the Board has no jurisdiction to deal with the certificate of a master of a ship upon an inquiry into misconduct or incompetency causing serious damage to his ship at a place beyond the territorial limits of the colony. It was also held that sec. 520 Merchant Shipping Act 1854 applies only to offences or complaints of a criminal nature : *In re Victoria Steam Navigation Board* ; *Ex parte Allen* (7 V.L.R.C.L. 248).

Prohibition lies to a Court of criminal no less than to a Court of civil jurisdiction. Prohibition will be granted to restrain a Coroner from holding inquest other than on a dead body *super visum corporis*, as on the origin of a fire where no death is occasioned : *R. v. Herford* (3 E. & E. 115 ; 29 L.J.Q.B. 249).

Prohibition lies to Quarter Sessions : *Pomfrye's Case* (Litt. Rep. 163) ; *R. v. Herford* (3 E. & E. 115).

" The first question is one of general importance in practice, as to whether a prohibition lies to justices. The general principle of prohibitions going to inferior Courts is by reason of their acting or being about to act contrary to legal principles. This was settled by three cases. In *Elstone v. Rose* (L.R. 4 Q.B. 4) and *Liverpool, &c. v. Everton* (L.R. 6 C.P. 414) the Court decided that where the inferior Court (there the County Court), when deciding a question of fact going to its jurisdiction, went on a wrong principle of law, prohibition would go ; and in *R. v. Bromley J.J.* (38 W.R. 253), the same principle was made applicable to justices. The only other cases are based on the ground of a question of title being raised. The fact of there being no other cases is explained by reason of the fact that the decisions of justices could in general be more easily reversed by *certiorari*. But there is no reason or principle of law why a prohibition should not be granted. In some cases it would seem to be the more convenient course . . . " : *Wright, J.—R. v. Longe* (66 L.J.Q.B. 278).

Prohibition lies to the Licenses Reduction Board of Victoria constituted under the Licensing Act 1906: *R. v. Licenses Reduction Board* (1908 V.L.R. 79; 29 A.L.T. 148; 14 A.L.R. 7); *R. v. Licenses Reduction Board* (1909 V.L.R. 79; 30 A.L.T. 223; 15 A.L.R. 282).

Prohibition lies to the Small Debts Court in Queensland: *Ferguson v. Smith* (4 Q.L.J. 158); *Pettigrew v. Townley* (1 Q.L.R. Pt. II., 31).

Two persons applied for land under the Land Act 1862, on the same day, and the land officer determined the priority between them by lot; a third applicant on a subsequent day gave notice of objection, and the sheriff thereupon took steps to call a jury. A prohibition was granted against the sheriff; his jurisdiction under the Act did not arise, because the objector's own notice showed that he selected at a subsequent day to the two others, and there was, therefore, no question of priority to be determined: *Ex parte Walter Briggs; In re Robert Rede* (1 W. & W.C.L. 377).

Prohibition lies to a Royal Commission appointed under the Commissions of Inquiry Act 1908 (New Zealand): *Cock v. Attorney-General* (28 N.Z.L.R. 405; 11 Gaz. L.R. 543). Cf. *Clough v. Leahy* (2 C.L.R. 139; 11 A.L.R. 32; 4 S.R. 401; 21 W.N. 129).

*Quære*, whether the Divorce and Matrimonial Causes Court under 20 & 21 Vic. c. 85, sec. 27, has jurisdiction to try a petition for divorce between British subjects, when the marriage was contracted in India. *Quære*, whether prohibition lies to that Court. *Blackburn, J.*, was inclined to think that, if there was an excess of jurisdiction, prohibition would lie. "But, on the other hand, the power of appeal to the House of Lords makes me doubt, because it is argued that if prohibition lies to the inferior it would also lie to the Appellate Court": *Re Foster v. Foster* (4 B. & S. 187).

"It was argued that prohibition would not lie to the Ecclesiastical Court, because it would not lie to the Privy Council. Whether in any case prohibition would lie to the Privy Council, or to any litigant or officer who should be about to execute an order made in Council upon the advice of members of the Judicial Committee, I think it unnecessary to determine. It seems very difficult to say that it would lie. I am unwilling to say without further argument that it would not. But I cannot agree to the proposition that because there is an appeal to a Court which cannot be prohibited, therefore the Court of limited jurisdiction of first instance cannot be prohibited. There is an appeal from the County Courts to a division of the High Court. The Division of the High Court cannot be prohibited. Can it be maintained that a County Court could not be prohibited?"—*Brett, L.J.*, in *Martin v. Mackonochie* (4 Q.B.D. at 755, 756).



“No doubt, if a party to a cause takes any steps to enforce a prohibited decree or judgment, he may be punished by the Court which prohibits. But if he applies only to the Court which has been prohibited to enforce its order, and upon refusal appeals to a Court which cannot be prohibited, I much doubt if there is any authority for saying he would be guilty of contempt. And if he were, the spectacle would be presented of a person imprisoned for contempt in taking steps to enforce an order which a Court, not subject to prohibition, declared to be perfectly valid, and proceeded to enforce. All this seems to me to show the extreme inconvenience of holding that a procedure or practice . . . upheld by the highest Ecclesiastical Court, is a ground for a prohibition when pursued by an inferior one.”—*Coleridge, C.J.*, in *Martin v. Mackonochie* (4 Q.B.D. at 785).

When a conviction is once removed to a superior Court by *certiorari*, no prohibition can go in respect of it : *R. v. Burnaby* (2 Ld. Ray. 900).

Sec. 48 Mayor's Court Act (20 & 21 Vic. c. 157) enacts that a judgment of the Mayor's Court, when removed into the superior Court, shall have the same force and effect as a judgment recovered in the superior Court. A judgment was so removed, and defendant applied for a prohibition to restrain further proceeding upon it. A prohibition was granted—the judgment of the Mayor's Court was without jurisdiction, and it was not cured of that defect by being removed to the superior Court : *Bridge v. Branch* (1 C.P.D. 633).

The applicant had become surety for such costs as the Supreme Court should order on an appeal to the Supreme Court from the Police Court in respect of a conviction under the Immigration Restriction Act 1901. By consent the appeal was taken direct to the High Court. It was dismissed with costs, which the applicant declined to pay as not being within the terms of his recognizance. The police magistrate, however, declared the recognizance forfeited, and the certificate of forfeiture was entered as a judgment of the Supreme Court. *Held*, that a motion for a prohibition made after the entry of the certificate must be refused, as the Court could not grant a prohibition in respect of what was now a Supreme Court judgment. *Rooth, J.* : “It is a well laid down rule of law that this Court cannot prohibit the Judges of this Court. It has been held in England, of recent years at all events, that the King's Bench Courts, the Chancery Courts, and the Divorce Courts cannot prohibit each other” : *Ex parte Fangett* (8 W.A.L.R. 195).

“That case (*Chabot v. Lord Morpeth*, 17 L.J.Q.B. 336 ; 15 Q.B. 446) appears to me to be a clear authority against issuing a prohibition as now asked, against this municipality. A municipality is not a tribunal, and a prohibition only issues to a Court or pretended Court



which assumes to exercise judicial functions": *Ex parte McInnes* (4 N.S.W.R. 143).

On application for a prohibition to restrain the Registrar of the District Court from proceeding on a judgment of that Court, *Faucett, J.*: "I think there is no precedent for such a course. It is contrary to the dignity of this Court to issue a writ of this high character against an inferior officer of an inferior Court." *Manning, and Windeyer, JJ.*, concurred: *Ex parte Martin* (1 N.S.W.R. 345).

Applicant had issued a summons in the Mining Warden's Court, but did not appear on the day appointed, and the case was struck out. The Mining Registrar, however, registered the title of the person against whom the applicant had taken out the summons. *Held*, that no prohibition lay to the Registrar. "So far as the conditional registration and final registration are concerned, it appears to me that they are so much waste paper, because the Registrar seems to have acted without receiving any notice of any adjudication. We cannot grant a prohibition to him, because he is not a Court, and we have not the slightest jurisdiction over him": *Ex parte King* (15 W.N. 29).

An order for costs had been made in respondent's favour; applicant sought a prohibition on the ground that the Judge had no jurisdiction to make an order for costs against him. "It is asked that the writ should be addressed to the defendant and the Registrar of the Court. Prohibition is a writ issued to restrain an excess of jurisdiction (or sometimes a wrongful exercise of jurisdiction) on the part of an inferior Court acting in the assumed exercise of judicial functions. In the case of excess of jurisdiction it is granted as soon as it appears that the inferior Court has committed such a fault as to found the authority of the superior Court to prohibit, *i.e.*, as soon as it appears that the inferior Court has acted without jurisdiction (*Mayor of London v. Cox*, L.R. 2 H.L. 239, 278). It is ordinarily addressed to the Court and the party, although if the Court assuming to exercise the jurisdiction objected to is out of the country, it may be addressed to the party alone (*Ib.*, p. 280). But I know of no case in which it has been addressed to any officer of a Court, unless he is assuming to act in a judicial capacity. And in my opinion the writ cannot be addressed to such an officer. The application cannot, therefore, be granted in the form in which it is made."—*Griffith, C.J.*: *Regina v. Edwards*; *Ex parte Howells* (7 Q.L.J. 25).

For cases in which prohibition does not lie, because the remedy is taken away by statute, see Part I., Introduction, p. 25.

By sec. 24 (5) Judicature Act 1873 no cause or proceeding at any time pending in the High Court or before the Court of Appeal shall be restrained by prohibition or injunction.

2. *Proceedings.*

The Commissioner of Woods and Forests was empowered by statute to resume lands, and in case of disagreement with the landowner as to the value, the value was to be assessed by the sheriff and a jury, the verdict to be final and conclusive. The judgment and verdict were to be recorded in the prescribed manner, and if the landowner should refuse to convey, the Commissioners were to pay the amount into the Bank of England, whereupon the lands were to vest in the Crown. The declaration in prohibition alleged proceedings under the Act and that the sheriff had misdirected the jury as to the assessment of value, and a prohibition was prayed to restrain the sheriff and Commissioners from recording the judgment and further proceeding thereon. *Held*, that the verdict and judgment were conclusive, and that the sheriff, after ordering payment, was *junctus officio*, that the recording of the verdict, &c., was not a condition precedent to their validity, and that the payment of money into the Bank of England was not a judicial act, but an act belonging to the Executive Government, and not the subject of prohibition : *Chabot v. Lord Morpeth* (15 Q.B. 446).

Purely legislative powers, or powers of promoting legislation, are not subject to prohibition · *In re Local Government Board* ; *Ex parte Kingstown Commissioners* (18 L.R. (Ir.) 509).

The Court will not grant a prohibition to stay a suit in the Ecclesiastical Court against the chancellor of a bishop to examine whether he be skilled in the civil law, although the bishop had granted him the office for life : *Sutton's Case* (Cro. Car. 65).

*Quaere*, whether prohibition lies in respect of an application *ex gratia* for a faculty before it is granted : *Hallack v. University of Cambridge* (1 Q.B. 593).

*Williams, J.*, said : “ The contention of the plaintiff here is that the Warden’s Court has heard and determined a matter which it had no jurisdiction to determine, and therefore that a writ of prohibition should go. To this the defendant replies that the case of *Re Spain’s Application* (2 Gaz. L.R. 264) decides that a prohibition will in no case go to the Warden’s Court. By sec. 254 the Mining Act 1898, jurisdiction is given to the Warden’s Court to hear and determine all such actions . . . as arise within the district concerning the various matters specified in the fourteen subsections which follow. What *In re Spain* decided was that the Warden’s Court, while exercising jurisdiction in respect of any of the matters specified in sec. 254, was by the Act placed on an equal footing with the Supreme Court, and that in such a case prohibition would not go ; but *In re Spain* certainly did

not decide that if the Warden's Court assumed jurisdiction in some matter of which the Act had not given it seisin, prohibition would not go. *In re Spain* was decided on the authority of *In re The New Par Consols Limited* ([1898] 1 Q.B. 669), and *Reg. v. The County Court Judge of North Allerton* ([1898] 2 Q.B. 680; [1899] A.C. 439). In the first case there was a statute which gave jurisdiction to a County Court to wind up companies, and provided that for the purposes of that jurisdiction it should have all the powers of the High Court. In the second case the Bankruptcy Act gave jurisdiction in bankruptcy to a County Court and provided that a County Court, in addition to the ordinary powers of the Court, should have all the powers and jurisdiction of the High Court. It was held in each case that in the exercise of the particular jurisdiction so given to the Court by statute the Court could not be controlled by prohibition or *certiorari*; but it was never held that if the County Court, while purporting to exercise the jurisdiction given it by the Companies Act or the Bankruptcy Act, heard and determined a matter outside the particular jurisdiction conferred on it by these statutes, it could not be prohibited. Here, the Warden's Court is an inferior Court, with the limited jurisdiction conferred upon it by sec. 254 of the statute. For the purpose of exercising this jurisdiction it is placed by the statute in the position of the Supreme Court. But it has no authority to hear and determine any matters which are not specified in sec. 254": *Wells v. Carew* (19 N.Z. L.R. 349).

By sec. 1 (6) Companies Winding-up Act 1890, the County Court has jurisdiction to wind up a company, and has for that purpose all the powers of the High Court. A County Court Judge made an order for the commitment of one of the directors in the course of winding-up proceedings. *Held*, that, though the order was wrongly made, prohibition did not lie; the Court was on the same footing as the High Court as regards such matters: *In re New Par Consols Ltd.* (14 T.L.R. 287; [1898] 1 Q.B. 669).

The proceedings of the committee of the West Australian Turf Club on the hearing of appeals from the decisions of racing clubs under the jurisdiction conferred by the West Australian Turf Club Act (Private Act), and by by-laws thereunder, on matters connected with protests as to the results of races and the disqualification of persons for turf offences, are in the nature of judicial proceedings: *Thomas v. Hayguard* (9 W.A.L.R. 212).

The governing body of a university may lawfully decree that every tradesman with whom a person in *statu pupillari* contracts a debt exceeding £5 shall make the same known to that person's tutor, on pain

of being discommuned, and such decree may be enforced by forbidding persons *in statu pupillari* to deal with the tradesman. Such proceedings are not judicial proceedings, and cannot be restrained by prohibition, nor do they become judicial because notice is given to the party complained of, and opportunity given him to show cause against the making of the order. Such notice does not entitle the party to appear by attorney : *Ex parte Death* (18 Q.B. 647 ; 21 L.J.Q.B. 337).

A recommendation by the Industrial Arbitration Court to the Minister, under s. 14 of the Industrial Disputes Act, that a Board be appointed is not a judicial, but a ministerial order, and prohibition will not lie in respect of it. *Per Darley, C.J.* : “ The writ of prohibition is a prerogative writ and will only lie to a lower Court in respect of an order or of a proceeding which may terminate in the making of an order which such Court has no jurisdiction to make ” : *Ex parte Newcastle Coal Co.* (6 C.L.R. 466 ; 8 S.R. 335).

A mining warden in granting permission to make a road over mining works under sec. 30 of 37 Vic. No. 13, is acting ministerially and not judicially, and prohibition will not lie in respect of the proceedings : *Ex parte Miller* (7 S.R. 214).

The respondent applied to a mining warden for possession of a mineral lease held by the applicant, upon the ground that the applicant was not fulfilling the labour conditions and also held another claim. The respondent gave notice to the applicant that he intended to apply to the Warden’s Court for possession of the land, but no summons was issued. The warden heard the application in the absence of the applicant, and, after taking evidence on oath, declared the land abandoned and authorised the respondent to occupy the land. It was held that the warden had made an order as a Warden’s Court under sec. 69 Mining Act 1874, and that, as no summons had been issued as required by sec. 70, a prohibition should go. It was further held that when the warden is dealing with an application for forfeiture under Reg. 7, he is acting judicially and as a Warden’s Court, and not merely ministerially : *Ex parte Biggins* (6 S.R. 493).

Application was made to restrain proceedings upon an order of a mining warden made under sec. 8 of 57 Vic. No. 32, authorising the respondent to enter on certain lands and mine for limestone. *G. B. Simpson, J.* (*Pring, J.*, concurring), said : “ I am of opinion that the warden, in reference to the grant by him of the authority to enter, was not acting as a Court. Therefore, any remedy which the applicant may be entitled to is not a matter for prohibition : *Ex parte Thackeray* (13 S.C.R. 1), per *Martin, C.J.*, at pp. 50, 51 ” : *Ex parte Phillips* (23 W.N. 145).



B. was charged with libel before justices. On motion for prohibition, objected that prohibition does not lie against magistrates acting ministerially, that it only lies to keep inferior Courts within their jurisdiction. . . . "The resident magistrate or justices, when acting ministerially in one sense—*i.e.*, as ancillary to a higher tribunal—do act judicially within their jurisdiction and do constitute a Court. They can commit for contempt; when an information is preferred they must judge and determine whether it is sufficient to justify them in proceeding. Every decision as to the reception or rejection of evidence is a judicial act; and finally they must judge and determine whether the evidence warrants a committal."—*Chapman, J. : R. v. Brent and Strode* (2 Macassey 888). See *R. v. Eyre* (L.R. 3 Q.B. 487).

While a prosecution for perjury was pending, the accused instituted proceedings against the chief witness for the prosecution for forgery. The Court held that the latter prosecution was instituted *mala fide* and granted a prohibition: *Ex parte Green* (9 N.S.W.R. 176). Cf. *Ex parte Cooper* (1 N.S.W.R. 143).

Prohibition granted to a suit in Equity for discovery of matter to make the defendant forfeit his freehold: *Firebrass' Case* (2 Salk. 550).

A poll had been taken on the question that "no new license shall be granted for two years," and was carried in the affirmative. Notices required by the Licensing Act of 1885 were duly sent to the Chairman of the Licensing Authority and to the Colonial Secretary; but fourteen days' notice of the proposed poll had not been posted at the doors of all public schools, post offices, and railway stations in the area, as required by sec. 116. A. subsequently applied for a license, but the Licensing Justices refused the application in obedience to the returning officer's notice. A *certiorari* was sought on the ground that the notices required before the poll had not been given, the rule being directed to the past and present returning officers and two ratepayers, calling on them to show cause why the writ should not issue to the chairman of the Divisional Board. *Lilley, C.J.*, delivering the judgment of the Court, said: "Is *certiorari* the appropriate legal remedy in this case? So far as our researches go, and nothing to the contrary was cited at the bar, *certiorari* goes only to remove a judicial proceeding into this Court for the purpose of review. To complete these proceedings, the justices should have been included in the rule, and then *certiorari* might have been granted, with prohibition and mandamus, which were held to be the appropriate remedies in *Regina v. Yaldwyn* (3 Q.L.J. 144). The proceedings of the returning officers and ratepayers cannot, we think, be regarded as judicial. They exercise an electoral option or choice which results in a resolution or administrative restriction on the



judicial action of the licensing authority, and deprives it of jurisdiction, or limits it within a particular number or area, &c. No evidence is taken—there is no hearing, and no judgment is delivered. It is, or may be, a declaration of the mere will or caprice, and not of the judgment of the ratepayers; and it would be a misuse of language to describe it in the terms used by counsel as ‘an order made by the inhabitants to prohibit justices exercising judicial function,’ if by such description a judicial order were meant. *Certiorari*, therefore, cannot be granted in respect of the ratepayers’ and returning officers’ procedure, unless by an entirely new departure from the established course of law. The case of *Regina v. Yaldwyn* furnishes the needed precedent so far as the ratepayers and returning officers are concerned. We adopt the rule laid down by Lord Justice Brett, in *Reg. v. Local Government Board* (10 Q.B.D. 320): ‘I think I am entitled to say this, that my view of the power of prohibition at the present day is that the Court should not be chary of exercising it; and that whenever the legislature entrusts to any body of persons, other than to the superior Courts, the power of imposing an obligation upon individuals, the Court ought to exercise, as widely as they can, the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.’ We can prohibit their further action on the illegal poll, resolution and notice, for it is an unlawful restraint upon the judicial action of the licensing authority. This will relieve the licensing justices, after notice of this rule, from giving effect to the resolution. Should the licensing authority, however, on a further application, act upon the resolution and refuse to grant a license, a rule for a *certiorari* to bring up their order might be applied for—as in *Yaldwyn’s case*—because the hearing of these applications under the Licensing Act is a judicial proceeding, consequently the decision of the licensing authority is a judicial determination, or order, which may be brought before this Court for review by writ of *certiorari*. The rule, therefore, will go in the modified form finally asked for by the counsel for the mover—as a rule for prohibition. There will be no costs, and the prohibition will extend to the justices.” *Regina v. Kelly on the prosecution of Joseph Ayre* (3 Q.L.J. 153).

A Royal Commission was appointed to enquire into the question whether the members of a licensing committee, or any of them, had accepted bribes in connection with an application for a license. *Held*, that the appointment was illegal and unconstitutional, as the enquiry was into the question whether or not a criminal offence had been committed by particular individuals, an enquiry only proper to be undertaken by a Court of law. A prohibition was granted to restrain the

Commission from proceeding with the enquiry : *Cock v. Attorney-General* (28 N.Z.L.R. 405 ; 11 N.Z. Gaz. L.R. 543). And see *Clough v. Leahy* (2 C.L.R. 139 ; 11 A.L.R. 32 ; 4 S.R. 401 ; 21 W.N. 129).

On an application for probate of the will of a deceased native, the Native Land Court, under sec. 46 The Native Land Court Act 1894, awarded a successor of the deceased not provided for in the will, who had not sufficient land for her support, a piece of land specifically devised by the will, other lands being specifically devised to other beneficiaries. It was held that the Court had power to do this, but it ought also to have applied the law of abatement to the other legacies. But " I cannot find that the Native Appellate Court has exceeded its jurisdiction by granting this land. There is no express provision in this statute that it is bound to proceed further and to state how the trusts of the will are to be executed. It has only taken the first step. If it ought to take a further step and alter the other devises, that is not a matter for prohibition ; that would be a matter for mandamus to compel the Native Land Court to take the next step. Before this Court could, on a motion for a prohibition, issue a mandamus, it would have to appear clear that there was no other remedy but in the Native Land Court."—*Stout, C.J., Cooper, J.*, took the same view : *Attorney-General v. Seth Smith* (25 N.Z.L.R. 557).

To restrain nuisance and waste : see Part I., Chapter VI., p. 266.

And see cases under " Nothing to Prohibit " : Part I., Chapter IX., p. 389.

## CHAPTER XII.

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### EFFECT OF GRANTING OR REFUSING THE WRIT.

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#### A.—RENEWING APPLICATION UPON REFUSAL OR DISCHARGE OF RULE.

If a Judge refuses or discharges a rule nisi for a prohibition to which the applicant believes himself to be entitled, the proper procedure is to make an original application to the Court for prohibition.

If the Court refuses a prohibition upon the merits, another application will not be allowed upon the same facts, or the facts existing at the time of the first application ; but if the prohibition is refused for defect of form, the applicant is not thereby debarred from making another application.

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When an order is refused by a Judge, the applicant, if dissatisfied, should apply to the Court and not to another Judge, unless under very peculiar circumstances. The practice of applying to a Judge for an order which has been refused by another Judge has been very severely reprobated. The application should be made within a reasonable time. It seems that it may, as a general rule, be strengthened by additional affidavits.—Chitty's Archbold's Practice, 12th ed., p. 1611.

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Prohibition to restrain proceedings in a District Court action. “ Mr. *Darley* took a preliminary objection that

the applicant's rule *nisi* was irregularly obtained as for a prohibition *de novo*, while the order of the Judge at Chambers, dismissing the applicant's rule *nisi* for the same object but without costs, was unappealed against: *Joynes v. Collinson* (13 M. & W. 560-8); *Todd v. Jeffrey* (7 Ad. & El. 519). The cases cited by Mr. *Darley* as to the English practice in the Bail Court are inapplicable by reason of the inherent distinction between Court and Chamber jurisdiction. With regard to the other authorities cited in support of this preliminary objection, viz., *Rossitt v. Hartley* (7 Ad. & E. 552n); *Ex parte Hasleham* (1 Dowl. N.S. 792); *Queen v. Manchester & Leeds R. C.* (8 A. & E. 413); *Leggo v. Young* (25 L.J.C.P. 176); and Chitty, pp. 1579, 1586 and 1596 (last ed.), we are of opinion that these authorities apply merely to cases where the Judge at Chambers has made some substantial order which in itself creates some impediment in the progress of the litigation between the parties, and which, if unappealed against, cannot be removed by the Full Court by any order made upon the independent motion. In such circumstances we think the regular practice should be to appeal against the existing order made at Chambers as preliminary to such further or other order upon the same facts proved at Chambers or upon additional facts, so that complete justice may be done by the Full Court. In this case, however, we do not think that the refusal of the Judge at Chambers to make the order *nisi* absolute offers in itself any impediment to the present application; and although the result of any such appeal, if made by the present applicant, might have been possibly to confirm that order, but with costs as against himself, still we do not think that such possibility can of itself give any force upon principle to his preliminary objection to our hearing the present motion": *Ex parte Bradley* (S.M.H., Sept. 9th and 13th, 1865).

A Judge in Chambers discharged a rule *nisi* for a statutory prohibition. Upon motion made to the Full Court to rescind this order, a preliminary objection was taken that there could be no appeal against a mere order of a Judge refusing the application, that the proper course was for the applicant to make an original motion to the Court to grant the prohibition. It was conceded that the practice was as stated in all ordinary cases, but it was urged and held that in statutory prohibitions "any order which a Judge may make under the 5th sec. of 17 Vic. No. 39—now 1902 No. 27, sec. 116—is subject to appeal."—*Faucett, J. : Ex parte Marx* (7 S.C.R. 344).

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As a general rule, if a party make an application to the Court and fail from a defect in the body of his affidavit, he cannot renew his application upon an amended affidavit. But this rule is not binding in all cases. Where a new state of facts has arisen since the first rule was discharged, the Court will sometimes allow a second application to be made. Where a rule, which by mistake purported to be moved for on behalf of B., was discharged upon an affidavit of B., showing that the rule had been moved without his authority and that an alteration complained of by the rule had been made with his authority, it was held that the second application might be made on behalf of A., the party really interested. Where a rule is discharged upon the ground that the affidavit was defective in the title or the jurat, the Court will allow the application to be renewed on the affidavit being amended and resworn. And if a party has succeeded in obtaining a rule, but has not acted upon it, he may move to revive it or obtain a new rule upon the same subject; but the Court will not always grant this indulgence.—Chitty's Archbold's Practice, 12th ed., p. 1592.



“ On motions for prohibitions it is frequent in doubtful cases to grant them *nisi*, or that the adverse party should show cause why they should not be granted. Also in nice and difficult cases it is usual to direct the plaintiff to declare on his prohibition and so proceed to issue, that the merits of the case may be brought before the Court with the greater exactness and they thereby be the better enabled to judge of the reasonableness of granting or refusing the prohibition. But if the Court be clearly of opinion that there is no ground for a prohibition, it ought to be denied without putting the defendant to expense and delaying in the meantime the exercise of what appears to them a lawful jurisdiction. For this denial is not conclusive to the plaintiff. If there is no jurisdiction, the sentence will be a nullity, and upon any attempt to exercise or enforce it, the whole may be tried in an action. The plaintiff may also apply to any other Court in Westminster Hall for a prohibition and take their opinions.—*Per Lord Mansfield*”: Bacon’s Abridgement, Prohibition (F).

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“ Where the plaintiff in prohibition failed in his proof and thereupon a consultation was awarded, afterwards upon appeal in another Court a new prohibition was awarded—cited Palm. 418, in the case of *Bowry v. Willingford*, as Mich. 21 Jac., *Davy v. Cocks*—S.C. cited Lat. 7 by name of *Davis’ Case*.—S.C. cited Lat. 75, by name of *Cockeril v. Davis*.—S.P. The granting the consultation for want of proving a modus suggested being only collateral and not granted upon the right: 2 Keb. 719. Mich. 22 Car. 2 B.R. in the case of *Briggham v. Robson*.—But Comb. 63 Mich. 3 Jac. 2 B.R., *Anon.*, *Holloway, J.*, said that after a consultation awarded for not proving the suggestion, &c., the party shall be for ever barred from having another Prohibition on the same libel”: Viner’s Abridgement, Prohibition (O.) (a) (3) note.

“ By the st. 50 Ed. 3, 4, no prohibition shall go after a consultation, unless the libel be engrossed, enlarged or otherwise changed. And, therefore, regularly, where a consultation was awarded upon the merits, the party shall not have another prohibition upon the same suggestion. Though he appeals and then prays another prohibition : R. Poph. 159 ; R. Latch. 6 ; R. Mo. 917 ; 1 Rol. 378. Though the consultation be granted by another Court : R. Cro. Eliz. 277.”—Comyn’s Digest, Prohibition (K.) (3).

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Where a consultation is awarded for defect of form it is not within 50 Edw. III. c. 4, and another prohibition may issue, but not if the consultation go for matter of substance : *Stroud v. Hoskins* (Cro. Car. 208).

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Where a prohibition is refused for a technical defect, another prohibition may be granted on the same matter : *Cox v. Semor* (Yelv. 102).

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A rule *nisi* for prohibition was discharged upon the objection that the affidavits contained merely hearsay matters and did not state the sources of information or deponent’s belief in their truth. A fresh application was made on proper materials, and objection was taken that the rule had been previously discharged. *Parker, C.J.* : “ Several cases were quoted by counsel (*Mayor of London v. Cox*, L.R. 2 H.L. 239 ; *Channel Coalging Co. v. Ross*, [1907] 1 K.B. 145 ; *R. v. Mayor, &c., of Liverpool*, 56 L.T. 314), but I can see nothing in the cases quoted which can be relied upon as an absolute authority to the effect that such second application cannot be made. I find that in the English County Courts Act 1888 it is enacted by sec. 132 that no second application for prohibition can be made except in certain circumstances, *i.e.*, on new grounds. I

imagine, therefore, that it was deemed necessary to specially legislate to prevent such second applications, and if at common law no such second application could be made, that legislation would not have been necessary. Again, I find it is understood that second applications can be made where there has been no adjudication. Here, as I have pointed out, there was no adjudication in the case, the rule *nisi* being discharged on the technical objection taken to the affidavits. In the circumstances, I arrive at the conclusion that a second application may be made to a Judge in cases where the first application has not been adjudicated upon as to the grounds." *Burnside, J.*: "Counsel referred to cases to the effect that the Court may take into consideration an application for a writ of prohibition upon known facts, but submitted that no second application—the first having been refused—might be entertained, and quoted in support the reasons given by the learned Judges in *R. v. Pickles* (12 L.J.Q. B.40). I think, however, that the rule so laid down was the outcome of a system of strictness which has been considerably relaxed since those days, and now there is no reason why a party who makes application unsuccessfully must fail and be further penalised by being prohibited from making a second application." *Rooth, J.*: "The main question as to whether or no prohibition would lie, where an application for prohibition has been already unsuccessful, seems to me answered by the fact that under this remedy he has as much right to petition the Court as the right he has to obtain a writ of *habeas corpus*; and it is a matter of common knowledge that a person may apply for a writ of *habeas corpus* as many times as such is required. As to whether the objection that prohibition would not lie after an application for a writ of prohibition had been unsuccessful, it could be good only on the ground that the affidavits contained something in the same nature; that the same grounds and the same set of facts prevents an applicant

from making a fresh application. I find a case of prohibition quoted in an Irish case, where the question of jurisdiction came before the Queen's Bench in a case stated by the Queen's Bench Division of the High Court of Ireland, which ruled that the magistrate had no jurisdiction. Afterwards an application for prohibition was made, and the Judges of that Court held there was no jurisdiction. It is clear that in cases of this sort this Court has jurisdiction to grant prohibition, and the right has been established " : *Forster v. Newman* (10 W.A.L.R. 166).

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If one Court refuses a prohibition, the applicant is not finally bound by the judgment. He " may apply for a prohibition to every Court in Westminster Hall " : *Le Caux v. Eden* (2 Doug. at 620).

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After consultation awarded, not on the merits of the cause, a second prohibition may go in the same matter : *Pool v. Gardner* (Carth. 463).

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There is no doubt that at present in prohibition and on *habeas corpus* the decision of one Court refusing a rule on which error cannot be brought, is not binding on another Court, though only of co-ordinate jurisdiction : *Harrington v. Ramsay* (2 E. & B. 669 ; 22 L.J. Ex. 326).

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The applicant applied for a prohibition against the Land Appeal Court on the ground that it had no jurisdiction to entertain a certain appeal. At the hearing, the applicant asked leave to add a ground that, even if the Land Appeal Court had jurisdiction to entertain the appeal, it had no power to make the order it did. Amendment was refused and the rule discharged. The applicant then

obtained a second rule for a prohibition on the ground that the Land Appeal Court had no power to make the order it did. *Held*, that this ground was open to the applicant on his first application, and not having been taken, the Court could not entertain a second application on the same matter. *Simpson*, A.C.J.: "I think the preliminary objection is well founded. This is an application for a prohibition on the ground of want of jurisdiction. Last term an exactly similar application was made to the Court, that is to say an application for a prohibition on the ground of want of jurisdiction. In the first case the contention was that the Land Court had no power to entertain the appeal at all; now the contention is that it had no power to make the order it did. The ground now taken could have been put forward on the first occasion, but was not. I think the case falls within the decision in *Thompson v. Southern Coal Co.* (15 N.S.W. R. 166), that a man must come to the Court properly prepared in the first instance, and ready to put forward the whole strength of his case. A man must not be twice harassed upon the same case. Another well-known principle is that it is to the interest of the State that there shall be an end to litigation." *Cohen and Pring*, JJ., concurred: *Ex parte Sherry* (26 W.N. 88).

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Where a rule *nisi* for a prohibition to an inferior Court has been discharged, the Court will not allow the motion to be renewed upon affidavits stating matter not before presented to the Court, but existing at the time of the original application: *Bodenham v. Ricketts* (6 N. & M. 537).

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As to renewing applications for prohibition to the County Court, see Judicature Act 1873, sec. 16 and cf. *The Receipta* (1893) P. 255.



**B.—OPERATION OF WRIT.**

Prohibition merely stays the inferior Court from further proceeding in the matter prohibited; it does not quash or nullify the proceedings which have already taken place.

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“Fourthly, he (*i.e.*, a person aggrieved by a summary conviction) had a remedy by writ of prohibition, in certain cases, if the justices had exceeded their jurisdiction or possessed no jurisdiction. This last-mentioned remedy was equally applicable, where it existed at all, to summary proceedings before conviction. But, like the remedy by *habeas corpus*, it did not operate directly against the conviction if the case had proceeded to one. The prohibition defeated such conviction by simply staying proceedings under it; whereas, upon an appeal or a *certiorari* the conviction, if not sustained, was quashed—or, in other words, absolutely reversed and made void. . . . A conviction, it seems to me, cannot be said to be quashed, if the proceedings on it are simply stayed. The term, therefore, is not applicable in reference to the proceeding by prohibition.”—*Stephen*, C.J., in *Kinchler v. Cowper* (2 S.C.R. 142).

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“On this application, which is an application for a common law prohibition, the Court cannot set the verdict aside. All the Court can do is to restrain any further proceedings upon the order.”—*Darley*, C.J., in *Ex parte Wallwork* (20 N.S.W.R. 278).

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“As to the other objection made by Mr. *Isaacs*, that the Court cannot, by this proceeding, deliver the applicant out of prison, we incline to think, from the passage quoted by Baron *Alderson* (in *Roberts v. Humby*, 3 M. & W. 120) from the 2nd Institute 602, that we must have the power

to do so. It is unnecessary, however, now to decide that point.”—*Dickenson, J.*, in *Ex parte Davis* (Legge 1305). See *Ex parte Wallwork* (20 N.S.W.L.R. 278).

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“There is no doubt the prohibition must go. How two persons can be jointly vagrants I cannot understand. It does not appear to us necessary to bring the prisoner before the Court by *habeas corpus*. She will be discharged by this order.”—*Stephen, C.J.*, in *Ex parte Andrews* (10 S.C.R. 172).

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“As the prisoner is illegally in custody, we should hope that some steps may be taken to procure his discharge without compelling him to apply to this Court again. The most usual course to quash the conviction is by *certiorari* or *habeas corpus*. *Ex parte Higgins* (10 Jur. 838) is a precedent for prohibition, but as that only lies where the Court has acted without jurisdiction, the question may arise whether the limitation as to time (*i.e.*, prosecution within six months of the offence) is not rather a matter for defence than as destroying jurisdiction”: *Ex parte Davis* (Legge 1305).

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“A consent has been filed, signed by counsel for both parties, to the Court treating the present application as a motion for *certiorari*, in order that, in the event of my determining that the applicants are entitled to prohibition, the convictions may be quashed.” His Honour thereupon treated the application as an application to quash the convictions and ordered accordingly.—*Per Cooper, J.*, in *Farrelly v. James* (23 N.Z.L.R. 921).

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A bishop had inhibited a clergyman from acting, and revoked his license to officiate as such. Upon application

for a prohibition against the order of the bishop, *Hargrave* J., said: "The prohibition being asked to restrain the proceedings on the original inhibition, will, of course, thereby set aside the inhibition, as well as all the subsequent proceedings, as illegal and void": *Ex parte Thackeray* (13 S.C.R. at 77).

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A. obtained judgment against B. in a Magistrate's Court and assigned his judgment to C. Thereafter a prohibition was granted in respect of the judgment and served on A. and the magistrate. An action was then brought upon the judgment by C. against B. *Held*, that he could not recover, even though he had no notice of the prohibition: *Smythies v. Catomore* (2 Macassey 806).

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The plaintiff in the District Court obtained a verdict for over £10, which, as no order was made to the contrary, carried costs: a prohibition *quoad* was granted whereby the verdict stood at £10. No special order had been made for costs when the plaintiff first obtained his verdict in the District Court. *Murray*, D.C.J., held that the plaintiff could not afterwards obtain a special order for costs: *Price v. Clack* (23 W.N. 228).

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### C.—DISOBEDIENCE OF WRIT.

If the respondents disobey a writ of prohibition they are liable to attachment.

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"In all cases, where a writ of prohibition is sued, directed to the party, or to the Judges, or to both, as it may be, if they proceed afterwards, there shall be an attachment against them. F.N.B. 40 D. *usq.* K."—Comyn's Digest, Prohibition (I.).

“ The disobeying of a prohibition is a contempt to the superior Court that awards it, and punishable by attachment, which issues against the Judge and party for proceeding after such prohibition, and for which they are subject to fine and imprisonment, according to the discretion of the superior Court . . . . . And not only an attachment lies for proceeding in the same cause pending a prohibition, but also for instituting a new suit for the same thing; as, if a parson libels for tithes and a prohibition is brought, and he libels for tithes of another year, the first not being determined, an attachment shall be awarded. In an attachment upon a prohibition, the plaintiff shall recover damages and costs against the party for proceeding after the writ of prohibition awarded. . . . Whether a prohibition issue providently or improvidently, until it is superseded, a proceeding in breach of it is a contempt.”—Bacon’s Abridgement, Prohibition (M.).

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“ If a prohibition be granted, it ought to be served before a subsequent proceeding to sentence or appeal. And if it be served and the Judge proceeds afterwards, an attachment goes; and he shall be examined upon interrogatories and fined for his contempt. 2 Jon. 47.”—Comyn’s Digest, Prohibition (H.) (1). See *Iveson v. Harris* (7 Ves. 251.).

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“ So, if after a prohibition granted, it be not served till sentence and appeal, it cannot be afterwards used. 2 Cro. 429.”—Comyn’s Digest, Prohibition (K.) (1).

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“ By all the justices if a parson libel for tithes and prohibition is brought and he libels for tithes of another year, the former not being determined, attachment will be awarded. So it is where a prescription is general for all

inhabitants, and prohibition is granted for one who is sued if the parson sues another on the same title, the former not being determined, attachment lies": *Charington v. Fleetwood* (Moore 599).

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On a libel for tithe milk of eight kine, a prohibition was granted. The parson again libelled for the same tithes against the same parishioner, "and in both libels there was no difference, but that in the later libel it was for a less number of kine." *Held*, that an attachment should issue for bringing a fresh suit for the same matter after prohibition granted: *Stafford's Case* (1 Leon. 111).

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"No doubt, if a party to a cause takes any steps to enforce a prohibited decree or judgment, he may be punished by the Court which prohibits. But if he applies only to the Court which has been prohibited to enforce its order, and upon refusal appeals to a Court which cannot be prohibited, I much doubt if there is any authority for saying he would be guilty of contempt. And if he were, the spectacle would be presented of a person imprisoned for contempt in taking steps to enforce an order which a Court, not subject to prohibition, declared to be perfectly valid and proceeded to enforce." *Cole-ridge*, C.J., in *Martin v. Mackonochie* (4 Q.B.D. at 785).

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In an action against the Judge of a County Court for making an order after being served with a writ of prohibition, the Judge at the trial told the jury that if defendant acted in the *bona fide* belief that his duty made it incumbent on him to do so, notwithstanding the prohibition, the act must be considered as "done in pursuance of" the County Courts Act (sec. 138 of 9 & 10 Vic. c. 95).



He also told them that the defendant “reasonably” believed it was his duty to proceed, if he believed according to his reason, as distinguished from caprice. *Held*—no misdirection. The question for the jury in such a case is, did the defendant try the cause properly, believing that his duty as a Judge called on him to do so? *Booth v. Clive* (2 L.M. & P. 283).



# PART II.

## PARTIES, PRACTICE, COSTS.

(ENGLAND.)

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### CHAPTER I.

### PARTIES.

#### A. Applicants.

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#### A.—APPLICANTS.

A writ of prohibition at common law may be obtained at the suit of the Crown, or of either of the parties in the inferior Court, or of a stranger.

##### i.—The Crown.

“The King has full prerogative and jurisdiction to do justice and right to all within his kingdom in all

causes, ecclesiastical or civil (5 Co. 8 b., De Jur. Eccl.). And may correct and reform all crimes abuses and enormities within his kingdom (5 Co. 9 b., De Jur. Eccl.; 2 Rol. 230, l. 5).”—Comyns’ Digest, *Praerogative*, D. 9.

“As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a great variety of Courts, hence it hath been the care of the Crown that these Courts keep within the limits and bounds of their several jurisdictions prescribed to them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed, which issues out of the Superior Courts of Common Law to restrain inferior Courts (Bacon’s Abridgement, Prohibition, quoting Rolle’s Abridgement).” “The object of prohibition in general is the preservation of the right of the King’s Crown and Courts, and the ease and quiet of the subject” (*ibid.*). “The King may sue for a prohibition, though the plea in the spiritual Court be between two common persons, because the writ is in derogation of his Crown and dignity” (*ibid.* C.).

Brett, J., in *Worthington v. Jeffries* (L.R. 10 C.P. 379).

“So the King shall not be prejudiced by his neglect to pursue his right.”—Comyn’s Digest, *Praerogative*, D. 86.

“Where, however, the<sup>\*</sup> defect is not apparent, and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, *although it should seem that the jurisdiction to grant a prohibition in respect of the right of the Crown is not taken away*, for mere acquiescence does not give jurisdiction: *Knowles v. Holden* (24 L.J. Ex. 223); yet

. . . . . the Court would decline to interpose . . . . . : *Willes, J.*, in *Mayor, &c., of London v. Cox* (L.R. 2 E. & I., at 283); adopted by Lord *Esher*, in *Broad v. Perkins* (21 Q.B.D. at 534).

“The King, by his prerogative, may sue in what Court he pleases (Sav. 9, 10. F.N.B. 7 B. 32 E.).”—Comyn’s Digest, *Praerogative*, D. 85.

“It has also been the recognised rule ever since books were written about prohibitions, that the Crown is entitled at any moment to invoke the aid of the Superior Court to restrain an inferior Court in the assertion of a pretended jurisdiction. That right was co-extensive with the right of the Crown to ask for a writ of *certiorari*” : *Griffith, C.J.*, in *R. v. Brisbane JJ.*; *Ex parte Treasurer of Queensland* (11 Q.L.J. 77).

Prohibition lies not to an inferior Court after the defendant has pleaded there; for by pleading the defendant submits to the jurisdiction. But at the suit of the King, prohibition lies though the defendant has pleaded : *Anon.* (1 Vern. 301).

“If a prohibition was granted by Q. Eliz., it seems that this continues now in the time of the King, so that the spiritual Court cannot proceed. M. 14 Ja. B.R., between Johnson and Poppinger was doubted *per curiam*, because it was granted *for a contempt to the Queen*.”

[Note.—“When a prohibition issues out of B.R., if no other process be there it is discontinued by demise of the King. But if attachment issues and is returned, as the *Chief Justice* said, or if the party appears and puts in bail, it is then become the suit of the party, and is not discontinued by the King’s demise. Lat. 114, 115, *Watkin’s case*.—Because in this case the prohibition is the suit of the party : Noy 77; *Dixye v. Brown*.”]—Viner’s



Abridgement, *Prohibition*, G (a). See also 1 Anne, Stat. 1, c. 8.

## ii.—Party in Inferior Court.

[*As to application by the person who invoked the jurisdiction of the inferior Court, see Delay Acquiescence, Part I., Ch. VIII., p. 318 et seq.*]

“If the defendant in a prohibition die, his executors may proceed in the Ecclesiastical Court, and the Judges of the Court out of which the prohibition was granted will also in such a case make a rule to the spiritual Court to proceed; but the plaintiff may, if he please, have a new prohibition against the executors.”—Bacon’s Abridgement, *Prohibition* (G).

Two defendants sued by the same plaintiff in separate suits, cannot apply jointly for a prohibition: *Gerrard and Sherrington’s Case* (1 Leon. 286); *Kadwalader v. Bryan* (Cro. Car. 162).

## iii.—Stranger.

**Illustrations.**—The fact that the defendant, a foreign sovereign, fails to appear to an action in the Mayor’s Court, does not disentitle the garnishee against whom process of foreign attachment has been issued, to apply for a writ of prohibition. He may apply either as a party aggrieved, or as a stranger: *Wadsworth v. Queen of Spain* (17 Q.B. 171).

A prohibition was sought against an action in the Mayor’s Court, on the ground that the defendant was a foreign sovereign. It was objected that the application could not be made before appearance in the Court below. But held that the Superior Court was bound to interfere as soon as the excess of jurisdiction was shown, and the

sovereign might apply either as the party aggrieved or as a stranger : *De Haber v. The Queen of Portugal* (17 Q.B. 171).

Sec. 15 of 20 & 21 Vict. c. 157 enacts that "no *defendant* shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatsoever except by plea." *Held*, that there is nothing to interfere with the right of the garnishee or a stranger to apply to a Superior Court for a prohibition : *Cooke v. Gill* (L.R. 8 C.P., at 115). And in the case of a similar application by the defendant for a prohibition on the ground that the cause of action did not arise within the jurisdiction, but *Borill*, C.J. : "You cannot get over the express enactment in the Mayor's Court Act. The defendant cannot have a prohibition." But the application was renewed on the following day in the name of a stranger, and a rule was granted : *Baker v. Clark* (L.R. 8 C.P. 121).

The Court, *at the instance of a stranger*, made a rule absolute for a prohibition to the Mayor's Court, London, after verdict for the plaintiff, notwithstanding that the claim was below £50 (see sec. 12 of 20 & 21 Vict. c. 157) : *Quarthy v. Timmins* (L.R. 9 C.P. 416) \* ; *Josolyne v. Roberts*, [1908] 2 K.B. 349.

An attorney is sufficiently a stranger to the suit in the Mayor's Court to entitle him to apply for a prohibition, although the defendant himself can only raise an objection to the jurisdiction by plea (20 & 21 Vict. c. 157, sec. 15) : *Willis v. Harris* (43 L.J.C.P. 208).

Sec. 12 Mayor's Court Act, 1857 (20 & 21 Vict. c. 157), enacts that no plea to the jurisdiction shall be allowed in cases where the plaintiff claims not more than £50, and

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\* In this case the proviso to sec. 12 (*infra*) was presumably not fulfilled, and no part of the action had arisen within the city. If however this proviso is complied with, so that a plea to the jurisdiction is not allowed, it would seem that prohibition will not lie either : *Hawes v. Pareley*, 1 C.P.D. 118.

the cause of action arose wholly or in part within the city; and by sec. 15 no defendant may object to the jurisdiction except by plea. Upon application by a defendant for a prohibition, *Coleridge*, C.J., said that sec. 15 must be strictly construed—it excludes the defendant only from coming for a prohibition, and “leaves any member of the public free to apply for it as before.” *Grove*, J.: “The present application is in an unprecedented form. All applications on the part of a defendant which I have heard since I sat in this Court, and I have heard plenty of them, have been applications for a prohibition in the name of a stranger”: *Evans v. Nicholson* (32 L.T. 778).

In the case of the Salford Hundred Court, on the other hand, it is provided by sec. 7 of the Salford Hundred Court of Record Act, 1868, that: “Save and except as aforesaid, no defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and if the want of jurisdiction be not so pleaded the Court shall have jurisdiction for all purposes.” Held by C. A. in *Payne v. Hogg*, [1900] 2 Q.B. 43, following *Chadwick v. Ball*, 14 Q.B.D. 855, that the last part of this section precluded applications for prohibition in all cases, even by strangers.

*Fellows*, J.: “Anybody may apply for a prohibition. . . . A stranger is interested in the administration of justice”: *R. v. Call*; *Ex parte Callaghan* (5 A.J.R. 91).

Judgment against applicant in Small Debts Court, and upon execution goods were seized on her premises. The goods were claimed by James under a bill of sale. An interpleader summons was ordered to issue and objection was taken to the Court’s jurisdiction to deal with the interpleader. On motion by applicant for a prohibition, it was objected that she had no *locus standi*, as she was not a party in the interpleader. *Held*, that whether she

had sufficient interest in the matter to set the Court in motion or not, *Ellis v. Fleming* (2 C.P.D. 237) is a distinct authority to show that where an inferior Court is acting without jurisdiction a stranger has the right to bring the matter before the Court and apply for a prohibition : *Ex parte Fraser* (20 N.S.W.R. 67).

Humphries sued Gibbons in Chancery for an account, and asked that Gibbons' lands be sequestered for levying the amount found due by him to Humphries. An order being made in these terms, Davy sought a prohibition, alleging that he was a purchaser under Gibbons, and that the Chancery had jurisdiction only in personal actions, whilst this sequestration affected land and bound the interest of it and was therefore against Magna Charta. *Holt, C.J.* : "It is Davy for whom you make this motion, and therefore you are not proper to have a prohibition for him ; but if he be turned out of possession, he ought to bring his action at common law. For the lands are sequestered as the lands of Gibbons, and it is but his suggestion that they belong to him ; and he would have a prohibition because he has made application to the Court and they will not relieve him. If you make a motion for Gibbons it will be another question ; but as to Davy he cannot have a prohibition" : *Davy's Case* (1 Ld. Ray. 531).

[As to whether the writ is discretionary when a stranger applies, see "*Writ discretionary or of right*," Part I., Ch. VIII., p. 271.]

#### iv.—Absconder from Justice.

Applicant had not appeared before the magistrate, but had been sentenced to a term of imprisonment and had not since been apprehended. "I do not think we can entertain this application. It appears that the applicant is an absconder from justice, and therefore he is not

entitled to make this application. He is in the same position as a man who has committed contempt of Court, and who cannot make any application to the Court till he has cleared his contempt": *per Darley, C.J., In re Pearson* (8 W.N. 8).

#### v.—Pauper.

See *Mulleneisen v. Coulson* (21 Q.B.D. 3); *Clements v. L. & N. W. Railway Co.*, [1894] 2 Q.B. 482.

### B.—RESPONDENTS.

#### i.—Crown—Attorney-General.

Prohibition lies against the King's fermor: *Gerrard and Sherrington's Case* (1 Leon. 286).

On application for a common law prohibition, it is not necessary to give notice to the Attorney-General: *Ex parte Gaynor* (Legge 1299).

#### ii.—Party in Inferior Court.

Applicant was convicted by justices and sent to prison for unlawfully working a bullock; a prohibition was sought on the ground that it appeared on the face of the proceedings that the offence was committed more than six months before the information was laid. It was objected that the prosecutor had not been made a party to the rule. "The modern practice must, we think, be regulated in analogy with that which prevailed formerly when there was a consultation and other proceedings not now in force. As to which we find in Com. Dig. Prohibition H. 1, that 'before a prohibition granted there ought to be a notice to the other party.' Again, in Bac. Abr., Prohibition M., it is laid down 'the disobeying a prohibition is a contempt to the superior Court which awards it and punishable by attachment, which issues against the Judge and party for proceeding after such



prohibition.' From these citations we are of opinion that the party prosecuting must, under the old practice, have been a party also to the proceedings upon prohibition, and therefore that the rule must be discharged as the party prosecuting was not called on by it": *Ex parte Davis* (Legge 1305).

### iii.—Stranger.

A suit was brought by some of the next of kin against the administratrix to compel her to distribute the estate according to a supposed agreement. A prohibition was granted as against the plaintiffs, but refused as against the next of kin not parties, though "the proceedings there being on terms the rest may join in the suit when they will": *Hill v. Bird* (Ayleyn. 56).

### iv.—Judge of Inferior Court.

Ordinarily the judge of the inferior Court is made a party to proceedings in prohibition. But, inasmuch as the other party to the proceedings in the Court below is always a party to the proceedings in prohibition, it is not as a rule necessary for the judge of the inferior Court to show cause against a rule *nisi*.

The propriety of the judge appearing to show cause is dealt with *infra*, p. 485, and cf. *R. v. Snayge*, [1909] 1 K.B. 644.

## CHAPTER II.

### PRACTICE—ENGLAND.

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The principles which govern the English Courts in granting or refusing writs of prohibition are the principles of the common law. And these principles and the authorities in which they are laid down and interpreted are dealt with exhaustively in the earlier chapters of this work.

#### FROM WHAT COURTS THE WRIT ISSUES.

The Courts which formerly had jurisdiction in England to grant writs of prohibition are enumerated in Chapter X., *ante*, p. 411. But the Judicature Acts have made some alteration in this respect, and the Courts

which now have jurisdiction to grant writs of prohibition are as follows :—

(i.) **All the judges of the High Court**, by virtue of sec. 16 of the Judicature Act, 1873. *Reg. v. JJ. of County of London and London County Council*, ([1894] 1 Q.B. 453).

This includes the judges of the Admiralty Court, *The Recepta*, [1893] P. 255, *per* Esher, M.R., at p. 262, and of the Chancery Division,\* *Jones v. Slee* (32 Ch.D. 585); *In re Briton Life Association* (39 Ch.D. 61).

(ii.) **The Court of Appeal**, on appeal from the High Court, except in criminal matters, by virtue of secs. 19 and 47 of the Judicature Act, 1873 (see *post*, p. 482).

(iii.) **The House of Lords**, on appeal from the Court of Appeal, by virtue of sec. 3 of the Appellate Jurisdiction Act, 1876 (see *post*, 483).

## TO WHAT COURTS THE WRIT ISSUES.

The Courts against which writs of prohibition will be granted are enumerated in Chapter XI., *ante*, p. 418. But now by sec. 24 (5) of the Judicature Act, 1873, "No cause or proceeding at any time pending in the High Court, or before the Court of Appeal, shall be restrained by prohibition . . . ." Consequently no question can now arise as to the possibility of such a writ

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\* Formerly the writ issued as of course out of the Petty Bag in Chancery upon a formal affidavit that there was no cause of action within the jurisdiction of the Court below. And such a writ, if wrongly obtained, was set aside in the Bail Court (*Amstell v. Lesser*, 16 Q.B.D. 187). But now this procedure has been superseded by an Order of the Master of the Rolls, made the 21st December, 1885.

"The Master of the Rolls desires that in future no writ of prohibition to an inferior Court shall be issued from the Petty Bag Office without the previous personal authority of the Master of the Rolls.

"The authority will not be granted on summons or hearing, but on an affidavit to be left at the Petty Bag Office setting forth the circumstances of the case, the alleged want or excess of jurisdiction, and the urgency of the matter.

"No such application will be entertained whilst there is a Court or judge of the High Court sitting, to whom the application can be immediately made."

ESHER, M.R.

21st December, 1885.

being issued against the Chancery Division, or the Probate, Divorce, and Admiralty Division.

Prohibition against County Courts is now provided for by statute (see *post*, p. 477).

### PROCEDURE.

In theory applications for a writ of prohibition fall into two classes :—

(i.) Applications for prohibition on the Crown side, *i.e.*, in criminal matters, matters in which the Crown has an interest, or matters connected with the duties of magistrates.

Formerly it was only in cases of this kind that the application was dealt with on the Crown side.

(ii.) Applications for prohibition not on the Crown side.

But in fact now all applications for a writ of prohibition are by arrangement dealt with on the Crown side. And although applications not properly belonging to the Crown side are not, strictly speaking, subject to the Crown Office Rules, yet in effect it will be both wise and convenient for the applicant to conform to these rules, except where other procedure is prescribed, as in prohibition to County Courts.

There would seem to be no reason why a judge of the Court of Chancery or of the Probate, Divorce, and Admiralty Division might not issue writs of prohibition to inferior Courts, in matters to which their jurisdiction extends. And it is submitted that, in a matter which is within the special jurisdiction of either of those Courts, the proper course to take would be to apply to those Courts. Cf., *e.g.*, *Jones v. Slec* (32 Ch.D. 585); *In re Briton Life Association* (39 Ch.D. 61). *The Recepta*, [1893] P. 255.

Such applications would not of course be upon the Crown side, but the procedure to be observed would in

the main be the same, except in case of appeal, when the appeal would go straight to the Court of Appeal (see *post*, p. 482).

The only practical distinction therefore, so far as procedure is concerned, is that between:—

I. Applications on the Crown side, which are subject to the Crown Office Rules, 1906.

II. Applications for a writ of prohibition to County Courts, which are governed by the County Courts Act, 1888.

## I. APPLICATIONS ON THE CROWN SIDE.

Crown Office Rules, 1906, R. 70. An application for a writ of prohibition on the Crown side shall be made by motion to a Divisional Court during the sittings for an order *nisi* in all criminal matters and in vacation by summons before a judge at chambers, and in civil proceedings on the Crown side by motion for an order *nisi* or by summons before a judge at chambers.

There is thus a distinction between criminal and civil matters. In criminal matters the applicant must go to the Divisional Court during term time, and may not apply at chambers except during the vacation. In civil matters, on the other hand, the applicant has a choice of applying either to the Court or to the judge at chambers.

### A. Applications to the Divisional Court.

The procedure (see C.O.R. 70, *supra*) is by motion *ex parte* for an order or rule *nisi* upon any day when *ex parte* motions are heard.

**Affidavits.**—The application must be supported by an affidavit setting out the facts upon which the applicant relies. In view of the case of *Bodenham v. Ricketts* (6



N. & M. 537), *ante*, p. 445, it is important that the affidavit should deal with *all* the facts relied on (see, however, pp. 438—445 for a general discussion of the authorities as to renewed applications, and cf. R.S.C., Ord. XXXVIII., r. 14, *post*, p. 468, as to technical defects in affidavits).

If objection was made in the Court below, this should be stated in the affidavit, as it negatives acquiescence : *Mendyke v. Stint* (2 Mod. 272). The following Crown Office Rules, 1906, apply to affidavits used on the Crown side.

R. 5. Ord. XXXVIII. (affidavits) of the Rules of the Supreme Court, 1883, shall, as far as it is applicable, apply to all proceedings on the Crown side.

R. 6. Affidavits on the Crown side shall be intituled “In the High Court of Justice, King’s Bench Division.”

R. 7. Every first and second class clerk in the Crown Office, as well as every other officer empowered under the Rules of the Supreme Court for that purpose, shall have authority to take oaths and affidavits on the Crown side.

R. 8. Every affidavit used on the Crown side shall be filed in the Crown Office Department of the Central Office. There shall be indorsed on every affidavit a note showing on whose behalf it is filed, and no affidavit shall be filed or used without such note, unless the Court or a judge shall otherwise direct.

R. 9. Upon motions founded upon affidavits, either party may apply to the Court or a judge for leave to make additional affidavits upon any new matter arising out of the affidavits of the opposite party : but no additional affidavits shall be used except such leave shall have been first obtained.

R. 10. The prosecutor or other applicant upon any order *nisi* or summons at chambers shall on demand by the respondent or his solicitor supply copies of any affidavit on which such order *nisi* or summons was obtained, and in like manner any respondent who proposes to read any affidavits upon showing cause shall on demand supply copies of such affidavits to the prosecutor or other applicant or his solicitor on payment of the ordinary charges.

(Cf. Ord. LXVI., r. 7, which is made applicable, though only to civil proceedings, by C.O.R., 1906, R. 263.)

R. 11. Affidavits of service shall state when, where, and how and by whom, such service was effected.

Rules 5 and 6 are apparently contradictory. In fact, the practice is that affidavits used to support an application for a rule *nisi* are intitled “In the High Court of Justice, King’s Bench Division,” only, and not in the cause. And this applies to all affidavits (at any rate on the Crown side) until the rule *nisi* has been made absolute, when any further affidavits should be intitled in the cause also.

It is not necessary to file affidavits before the motion, but they should be handed in when the application is made to the officer of the Court, stamped with a 2s. 6d. stamp for filing.

R.S.C., Ord. XXXVIII., is incorporated by R. 5 (*ante*), where applicable, and attention is called to the following rules of that Order.

R. 1. Upon any motion, petition or summons, evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making such affidavit.

R. 2. Every affidavit shall be intituled in the cause or matter in which it is sworn . . . .

(Cf., however, C.O.R., 1906, R. 6, *ante*.)

R. 10. . . . every affidavit used on the Crown side of the Queen's Bench Division shall be filed in the Crown Office Department. . . . There shall be indorsed on every affidavit a note showing on whose behalf it is filed, and no affidavit shall be filed or used without such note, unless the Court or a judge shall otherwise direct.

R. 14. The Court or a judge may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect or misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received.

R. 19. Except by leave of the Court or a judge no order made *ex parte* in Court founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion.

As to the admissibility of a statutory declaration in place of an affidavit, see *Wolseley v. Worthington*, 14 Ir.Ch.R. 369.

**Parties.**—The question whether a stranger will be granted a writ of prohibition is dealt with *ante*, p. 287.

It is customary to apply as against the other party to the suit as well as against the Court to be prohibited, *ante*, p. 460.

**Powers of the Court upon an Ex parte Application.**—

C.O.R., 1906, R. 71. The order may be made absolute *ex parte* in the first instance on special circumstances being shown, in the discretion of a Court or judge.

But the Court will only exercise this power in a clear case, and will generally, if the applicant makes out a *prima facie* case, content itself with granting an order or rule *nisi* (*vide ante*, p. 441.)

**Form of Rule Nisi.**—The rule or order *nisi*, if granted, is drawn up at the Crown Office and may be in the following form :—

Devonport. Upon reading the affidavit of A. B. and the exhibit therein referred to,

It is ordered that       day the       day of       next be given to His Majesty's justices of the peace in and for the borough of Devonport, the mayor and burgesses of the said borough, hereinafter called the corporation, and C. D., town clerk of the said borough, to show cause why a writ of prohibition should not be awarded to prohibit the said justices or any of them from further proceeding to hear and determine the matter of several informations preferred by the said town clerk on behalf of the said corporation against       , charging that [set out the offence charged]

Upon the following ground, that is to say that the jurisdiction of the magistrates is ousted by reason of [set out grounds]

Upon notice of this order to be given to the said justices or some of them, the said corporation and the said town clerk in the meantime

On the motion of Mr.       .

**Service of Rule Nisi.**—It should be served on the parties whom the Court has ordered to show cause.

R.S.C., Ord. LII., is made applicable by C.O.R., 1906, R. 232, and r. 6 of that order provides as follows :—

R. 6. If on the hearing of a motion or other application the Court or a judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that

such notice may be given, upon such terms, if any, as the Court or judge may think fit to impose.

Inasmuch as service of the rule *nisi* is not by the C.O.R., 1906, directed to be personal, C.O.R., 1906, R. 128, applies :—

R. 128. Whenever under these Rules service of any writ, notice, pleading, order, summons, warrant, or other document, proceeding, or written communication, is not directed to be personal, service at the last known place of abode, or business, with a clerk, wife or servant, or upon such other person, or in such other manner as the Court or a judge may direct, shall be deemed to be a sufficient service.

Before the day named in the rule *nisi* for showing cause, the motion must be entered for hearing in the Crown Paper by filling up and leaving at the Crown Office a *præcipe* (E. 26) with a £2 stamp.

The applicant must also comply with Crown Office Rules, 1906 :—

R. 132. In all causes or matters entered for hearing in a Divisional Court, the party or solicitor entering shall, at least two days before the day appointed for hearing, deliver copies of the proceedings for the use of the judges at the Crown Office. Such copies must be arranged in separate sets, that is to say, one complete set for each judge.

R. 133. Such copies shall be marked “for the use of the judges,” and not with the name of any particular judge.

R. 134. Such copies shall contain, where the party is seeking to quash any order or conviction, together with copies of the proceedings, a copy of the order *nisi* to quash.

R. 135. If copies are not delivered the other party may, on the day following, deliver such copies as ought to have been so delivered by the party



making default, and the party making default shall not be heard until he shall have paid for such copies or deposited at the Crown Office a sufficient sum to pay for same. In default of both parties the case shall be struck out, unless otherwise ordered.

Office copies are provided for by R. 127.

R. 127. Copies of all informations, indictments . . . and every other proceeding filed in the Crown Office shall, when required, be made at the Crown Office and delivered to the respective parties or other parties requiring the same on payment of the proper charges.

C.O.R., 1906, R. 263, is as follows :

R. 263. Ord. LXVI. of the Rules of the Supreme Court, 1883 (notices), shall, as far as it is applicable apply to all civil proceedings on the Crown side.

**Motion to make the Order Absolute.**—If upon the day named for showing cause the party ordered to show cause does not appear, the Court may upon motion by the applicant proceed to make absolute the order *nisi*, provided they are satisfied that the rule *nisi* was properly served. If they are not so satisfied Order LII. R.S.C., r. 6, applies (*q.v. ante*, p. 469).

The following is the official form of affidavit of service not personal, with which the applicant should be equipped upon the motion to make absolute the order *nisi*, if he has any reason to suppose that cause will not be shown.

In the High Court of Justice

King's Bench Division

I, A. B., of                      make oath and say :—

That I did on                      the                      day of                      , 191                      , serve C. D., mentioned in the order hereunto annexed marked "A.," with the said order, by delivering a true copy of the said order to                      , and leaving the same with [the wife, clerk, or servant of] the said C. D., at the

dwelling house [or office] of the said C. D., situate at  
 , in the county of , And at the same time  
 showing to the said the said original order.  
 Sworn, &c.

If for any reason the party ordered to show cause is unable to appear on the day named and wishes for delay, a substantive application may be made under C.O.R., 1906, R. 236.

R. 236. The following applications shall be made upon two clear days' notice of motion, and be brought on as if they were *ex parte* motions and not put in the Crown Paper.

(a) For time, enlargement, stay, or security. . . .

An application of this kind should be made before the day fixed for showing cause, and should be supported by affidavit, in accordance with C.O.R., 1906, R. 234.

R. 234. All other orders of Court (*i.e.*, than those specifically mentioned in the preceding Rule 233) shall, during the sittings, be made by the Court on motion supported by affidavit, but no affidavit shall be necessary for an order demandable as of right by the Crown, or where it is not necessary to state matters of fact.

**Showing Cause against the Order Nisi.** If the other party appears to show cause, the procedure is as follows. Counsel for the party showing cause begins.

C.O.R., 1906, R. 136. On the argument of any case where the Court has granted an order *nisi*, the counsel for the party showing cause shall begin.

The applicant's counsel has the right of reply. All counsel on both sides are entitled to be heard.

The affidavits supporting the application are entitled and handed in in the same manner as those used by the

applicant upon the *ex parte* application for the order *nisi* (see p. 467, *ante*).

If the applicant wishes to file further affidavits in answer to those handed in by the party showing cause, he must apply to the Court on the hearing for leave to do so under C.O.R., 1906, R. 9 (*ante*, p. 466), and for an adjournment under R.S.C. Ord. LII. r. 7.

R. 7. The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or judge shall think fit.

**Powers of Court, upon cause shown.**—Upon hearing counsel on both sides, two courses are open to the Court. They may either order pleadings or deal with the case at once.

(i.) **Pleadings.**—In cases of difficulty the Court will sometimes order pleadings to be delivered. In that case C.O.R., 1906, R. 126 applies:—

R. 126. Where pleadings in prohibition are ordered, the pleadings and subsequent proceedings, including judgment and assessment of damages, if any, shall be, as nearly as may be, the same as in an ordinary action for damages.

The order *nisi* will be enlarged for this purpose, and after the delivery of the pleadings the issues of fact (if any) will be determined by the jury; and the judge may upon argument direct that judgment be entered, if for the plaintiff in prohibition, that the writ do issue; if for the defendant in prohibition, that the order be discharged: cf. *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q.B. 749.

Failing such direction by the judge, the procedure would seem to be that the successful party should move that the order *nisi* be made absolute or discharged, as the case may be, upon an affidavit that issue has been joined and tried and that judgment has been obtained.

Inasmuch as there is now in civil proceedings an

appeal to the Court of Appeal, and so to the House of Lords, pleadings are seldom ordered: *Serjeant v. Dale* (2 Q.B.D. at p. 568), *Toomer v. London, Chatham and Dover Ry. Co.* (2 Ex.D. at p. 458).

(ii.) If the Court do not order pleadings, and do not order an adjournment for further affidavits (see *ante*, pp. 472, 473), they will proceed to discharge the rule *nisi*, or to make it absolute as the case may require.

**Discharge of Rule.**—If the Court order the rule to be discharged, this order need not be drawn up, unless the rule be discharged with costs, in which case it must be drawn up at the Crown Office and served on the solicitor of the unsuccessful party, in order that the costs may be taxed.

**Rule made Absolute.**—If the Court order the rule or order to be made absolute, this order should be drawn up at the Crown Office. (For Form of Order see Chitty, K.B. Forms, 13th ed., p. 793).

Upon this order the writ will issue. The official form of a Writ of Prohibition, Form No. 39 of the Appendix to the C.O.R., 1906, is as follows:—

George the Fifth, by the grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith to [here insert direction] to A. B. [and C. D. and E. F.] and to every of them greeting

Whereas we have been given to understand that you the said [justices have entered an appeal by A. B. against, &c.] And that the said <sup>has</sup> <sub>have</sub> no jurisdiction to hear and determine the said <sup>has</sup> <sub>have</sub> by reason that [here state facts showing want of jurisdiction]

We therefore prohibit you from further proceeding in the said .

Witness, Richard Everard, Baron Alverstone, at the Royal Courts of Justice, London, the day of , in the year of our Lord one thousand nine hundred and .

By order of Court [*or of Mr. Justice* ], at the instance of .

This writ was issued by M. N., of X., solicitor for [or if the case be so, agent for G. H., of Y., the solicitor for ].

The following C.O.R., 1906, apply to writs on the Crown side :—

R. 209. All writs on the Crown side shall be issued at the Crown Office.

R. 210. Every writ shall be prepared by the solicitor or party suing out the same, and shall be written or printed on parchment or paper wove “Loan ” handmade 40 lbs. per ream, in double foolscap or thereabouts. Every writ shall, before being sealed, be endorsed with the name and address of such solicitor or party; and if sued out by the solicitor as agent, with the name and address of the principal also.

R. 211. There shall be an entry made, in a book to be kept for that purpose, of every writ issued at the Crown Office, with the exception of writs of subpoena *ad testificandum* and *duces tecum*.

R. 212. Every writ except as otherwise by these Rules provided shall bear date on the day on which the same shall be issued, and shall be tested at the Royal Courts of Justice, London, in the name of the Lord Chief Justice of England.

## B. Applications to the Judge at Chambers.

As was pointed out above, in criminal matters these are only made during vacation. But in civil matters the applicant may always proceed in this way.

The application is in the first place *ex parte*, and upon a similar affidavit to that required in the case of an *ex parte* application to the Court (see *ante*, p. 465, *et seq.*); it





Strand, London, on            day, the            day of            ,  
 191    , at            o'clock in the            noon, upon the  
 hearing of an application on the part of the above-named  
 A. B. that a writ of prohibition issue directed to [*the*  
*judge of*            ] and to C. D. to prohibit them from  
 further proceeding in the above-mentioned [*proceeding*]  
 upon the ground that [*set out the grounds*], and that the  
 said C. D. be ordered to pay to the said A. B. the costs  
 occasioned by this application.

This summons should be served upon all the parties to whom it is directed, and entered for hearing in the judge's list for the day mentioned in the summons.

**The Return of the Summons.**—This corresponds to the showing cause in the case of an application to the Court, and affidavits will be drawn and used in the same manner as upon showing cause (*q.v. ante*, p. 472).

**Powers of Judge.**—These are similar to those of the Court (see *ante*, p. 473), and if the judge does not adjourn the hearing for pleadings for further affidavits he will either dismiss the summons or grant the writ. In the latter case the order and the writ will be drawn up as in the case of applications to the Court.

**Costs** (see *post*, p. 483).

## II. APPLICATIONS FOR PROHIBITION TO COUNTY COURTS.

These are governed by ss. 127—130 and 132 of the County Courts Act, 1888.

S. 127. It shall be lawful for any judge of the High Court, as well during the sittings as in vacation, to hear and determine applications for writs of prohibition to any Court and to make such orders for the issuing of such writs as might have been made by the High Court, and all such orders so made by any such judge of the High Court shall have the same force and effect as heretofore.

The jurisdiction of the judges of the Chancery Division and of the Probate Division is preserved by this section; and this jurisdiction was exercised by a judge of the Probate Division in 1893: *The Recepta*, [1893] P. 255; cf. *Jones v. Slee* (1886), 32 Ch.D. 585. In fact, now all these appeals appear to be dealt with in the Crown Office.

**Procedure.**—The method of application was formerly prescribed by R.S.C., Ord. LIX., r. 8A, which is as follows:—

R. 8A.—Every application for a prohibition to a county court other than an application by the Attorney-General shall be brought by notice of motion served on the parties to the proceedings in the county court, or such of them as may not be applicants for the prohibition.

And such applications, if made to Divisional Courts, were formerly made upon notice accordingly: *King v. Charing Cross Bank* (1889), 24 Q.B.D. 27. But C.O.R., 1906, R. 1, purports to annul r. 8A:—

R. 1. Ord. LXVIII., rr. 2, 3, and 4 of the Rules of the Supreme Court, 1883, so far as they relate to proceedings on the Crown side, and Ord. LIX., r. 8A, the Crown Office Rules, 1886, and all existing rules or practice on the Crown side inconsistent with these Rules are hereby annulled . . . .

The wording of this rule makes it difficult to understand whether the annulment of r. 8A is absolute or only in reference to proceedings on the Crown side. But it is at least doubtful whether a Crown Office Rule professing to deal with practice not actually on the Crown side is not *pro tanto*, *ultra vires*. It is therefore submitted with some doubt that C.O.R., 1906, R. 1, does not alter the practice of such applications, unless they happen to be on the Crown side; and the vast majority of cases of prohibition to county courts are not cases on the Crown side (see *ante*, pp. 464—5).

*Semble*, therefore, that applications for prohibition to county courts, if made in the first place to a Divisional Court, should still be by notice of motion, except in cases on the Crown side.

Fortunately this question is an academic one, for by direction of the judges all such applications are now made in the first place by summons to a judge in chambers, and the procedure is the same as in other applications for a prohibition at chambers (*q. r. ante*, p. 475), *i.e.*, by *ex parte* application at chambers: *King v. Charing Cross Bank* (1889), 24 Q.B.D. 27. (For forms, see Chitty's K.B. Forms, 13th ed., p. 790, *et seq.*)

Sec. 128.—County Courts Act, 1888 :—When an application shall be made to the High Court or a judge thereof for a writ of prohibition addressed to any Court, the matter shall be finally disposed of by order, and no declaration or further proceedings in prohibition shall be allowed. Upon any such application the judge of the Court shall not be served with notice thereof, and shall not, except by the order of a judge of the High Court, be required to appear or be heard thereon, and shall not, except by such order, be liable to any order for the payment of the costs thereof; but the application shall be proceeded with and heard in the same manner in all respects as any case of an appeal duly brought from a decision of a judge; and notice thereof shall be given to or served upon the same parties as in any case of an order made or refused by a judge in a matter within his jurisdiction, as the case may be.

Sec. 129. The grant by the High Court, or by any judge thereof, of an order or summons to show cause why a writ of certiorari or prohibition should not issue to any Court shall, if the High Court or a judge thereof so direct, operate as a stay of proceedings in the action or matter to which the same shall

relate, until the determination of an order or summons, or until such High Court or judge thereof shall otherwise order; and the judge shall from time to time adjourn the trial of such action or matter to such day as he shall think fit, until such determination, or until such order be made; but if a copy of such order or summons shall not be served by the party who obtained it on the opposite party and on the registrar two clear days before the day fixed for the trial of the action or matter, the judge may, in his discretion, order the party who obtained the order or summons to pay all the costs of the day, or so much thereof as he may think fit, unless the High Court or a judge thereof shall have made some order respecting such costs.

Sec. 130. Where a writ of certiorari or of prohibition to a Court shall have been granted by the High Court or a judge thereof on an *ex parte* application, and the party who obtained it shall not lodge it with the registrar, and give notice to the opposite party that it has issued, two clear days before the day fixed for the trial of the action or matter to which it shall relate, the judge may, in his discretion, order the party who obtained the writ to pay all the costs of the day, or so much thereof as he shall think fit, unless the High Court or a judge thereof shall have made some order respecting such costs.

Sec. 132. When the High Court or a judge thereof shall have refused to grant a writ of certiorari or prohibition to a Court, or any such order as in the last preceding section mentioned, no other Court or judge shall grant such writ or order; but nothing herein shall affect the right of appealing from the decision of the judge of the High Court to the High Court itself, or prevent a second application being made for such writ or order to the High Court or a



judge thereof on grounds different from those on which the first application was founded.

## APPEAL.

**A. From the Judge in Chambers.**—Judicature Act, 1873, s. 50:—

Sec. 50.—Every order made by a judge of the High Court in chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice by any Divisional Court, or by the judge sitting in Court, according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned; and no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the judge by whom such order was made, or of the Court of Appeal. (Cf. R.S.C., Ord. LIV., r. 23.)

The “orders made in the exercise of such discretion as aforesaid” which are excepted from the effect of the above section are orders as to costs only and orders by consent (which are dealt with in sec. 49). The effect of the section is that, whether the applicant for a writ of prohibition is successful or not, there is an appeal, without leave, from the judge in chambers to a Divisional Court: *Watson v. Petts*, [1899] 1 Q.B. 54; except in criminal matters, when the decision of the judge in chambers is final: *Ex parte Pullbrook*, [1892] 1 Q.B. 96. No leave is required: *Morton v. Emanuel* (1898), 43 Sol.J. 97. And there is an appeal even as to the exercise of the judge’s discretionary right to grant or refuse the writ, for such discretion is a judicial one: *Payne v. Hogg*, [1900] 2 Q.B. 43 at p. 56.

The procedure is governed by C.O.R., 1906, R. 267.

R. 267.—In every case on the Crown side in which an appeal lies from a judge at chambers to a Divisional Court, the appeal shall be by motion and shall be made within eight days after the decision appealed against, or if no Court to which such appeal can be made shall sit within eight days, then on the first day on which any such Court may be sitting after the expiration of such eight days.

Similarly, if the proceeding be not on the Crown side, *e.g.*, an ordinary application for a writ of prohibition to a county court, the procedure is governed by R.S.C., Ord. LIV., r. 24.

R. 24.—In the King's Bench Division, except in matters of practice and procedure, every appeal to the Court from any decision at chambers shall be by motion, and shall be made within eight days after the decision appealed against, or if no Court to which such appeal can be made shall sit within such eight days, then on the first day on which any such Court may be sitting after the expiration of such eight days.

Notice of motion should be served on the other side—for form see Chitty, K.B. Forms, 736—within five days of the day on which the decision was given, and for a day within eight days of the day of the decision.

In the now somewhat rare case of an application being made in the Chancery Division or in the Probate, Admiralty and Divorce Division (see *ante*, pp. 463, 464), the appeal from the judge in chambers would, under the provisions of sec. 50 of the Judicature Act, 1873 (*supra*), be straight to the Court of Appeal: *Jones v. Slee* (1886), 32 Ch.D. 585; *The Recepta*, [1893] P. 255. Before appealing, the appellant must either move in Court to discharge the order, or else obtain the judge's certificate that no further argument is required.

**B. From the Divisional Court.**—Judicature Act, 1873, sec. 19:—

Sec. 19.—The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as herein-after mentioned, of Her Majesty's High Court, or of any judges or judge thereof, subject to the provisions of this Act, and to such rules and orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act.

By sec. 100 of the same Act the term order includes rule. The exceptions in this section are orders as to costs only and orders by consent, which are by sec. 49 final; orders made by a judge in chambers (not in matters of practice and procedure), which—as we have seen *ante*, pp. 480–482—must first be taken to a Divisional Court; and decisions in criminal matters, which are by sec. 47 made final.

The effect of this section (19) is that, except in criminal matters, an appeal lies from a Divisional Court to the Court of Appeal, in respect of any decision as to prohibition, whether in the first instance or on appeal from chambers, and whether it be to grant, to refuse, to make absolute, or to discharge a rule *nisi*. No leave to appeal is required: *Lister v. Wood* (1889), 23 Q.B.D. 229; *Barton v. Titmarsh* (1880), 49 L.J.Ex. 573.

**C. From the Court of Appeal.**—Appellate Jurisdiction Act, 1876, sec. 3 :—

Sec. 3.—Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the Courts following; that is to say

(1) Of Her Majesty's Court of Appeal in England . . . .

## **COSTS.**

There was formerly some doubt as to whether the King's Bench Division had power to award costs in

cases on the Crown side. But by *Reg. v. London J.J. and the London County Council*, [1894] 1 Q.B. 453 ; 63 L.J.Q.B. 301 ; 70 L.T. 148, it was decided that the judges of the High Court had succeeded to the jurisdiction formerly exercised by the Chancery Courts in respect of costs, and, by virtue of this succession, the King's Bench Division now exercises jurisdiction over costs, in all cases of prohibition whether the suit be granted or refused. And for the same reason the judges of the Probate Division, and *a fortiori* of the Chancery Division, have similar powers, in cases not upon the Crown side.

In cases not upon the Crown side the Courts seem always to have possessed a jurisdiction as to costs : cf. *e.g.* *Yates v. Palmer* (1849), 6 D. & L. 283 ; *Wallace v. Allen* (1875), L.R. 10 C.P. 607 ; even though they did not always exercise it : *Barnes v. Marshall* (1852), 21 L.J.Q.B. 388.

In criminal matters C.O.R., 1906, R. 262, applies :—

R. 262. Order LXV. of the Rules of the Supreme Court, 1883 (costs), special and general regulations, r. 27, shall, as far as it is applicable, apply to all criminal proceedings on the Crown side.

R. 27 deals with the details of costs allowable in specific instances. (See Annual and Yearly Practices.)

In civil matters C.O.R., 1906, R. 261, applies :—

R. 261. Order LXV. of the Rules of the Supreme Court, 1883 (costs), shall, as far as it is applicable, apply to all civil proceedings on the Crown side.

This order contains the general rules as to costs in proceedings in the High Court. (See Annual and Yearly Practices.)

The effect of r. 1 of that Order is that in civil matters, if any issue of fact should arise, and be sent to a jury, the costs would follow the event, unless the judge were to order otherwise.

**General Principles.**—If an applicant for a rule *nisi* is

unsuccessful, no question of costs can arise, as the applicant will of necessity have to pay his own costs.

Where a rule *nisi* has been obtained, and is discharged, the applicant will in general be ordered to pay the costs of the party showing cause: *Wallace v. Allen* (1875), L.R. 10 C.P. 607; cf. *R. v. Mayor of Bridgnorth* (1839), 10 A. & E. 66.

On the other hand, if the rule *nisi* be made absolute, the party showing cause will, in general, be ordered to pay the costs: cf. *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q.B. 749; *R. v. London JJ. and London County Council*, [1894] 1 Q.B. 453; 73 L.J.Q.B. 301; 70 L.T. 148.

Should, however, the successful party be open to blame, the Court might make no order as to costs: *Toomer v. L. C. & D. Ry.* (1877), 2 Ex.D. 450; cf. e.g. *R. v. Langridge* (1855), 24 L.J.Q.B. 73; *S. E. Rail. Co. v. Railway Commissioners*, 6 Q.B.D. 586.

In *Ellis v. Fleming* (1876), 1 C.P.D. 237, though the rule *nisi* was discharged, it was discharged without costs: cf. *R. v. Consistorial Court of London* (1862), 2 B. & S. 339, at p. 363.

If the Crown be a party to the proceeding, the rule that “the Crown neither pays nor receives costs” still holds good, unless an Act of Parliament provides expressly or by clear implication that the Crown is to pay costs.

**Costs of Judge of Inferior Court.**—The propriety of the judge of the inferior Court appearing to show cause depends on the nature of the case. And if the case be one in which he has acted properly below, and “does no more than his duty in instructing counsel to show cause,” he will not be visited with costs, even though the order be made absolute: cf. *Ricken v. Yorke Peninsula JJ.*, [1908] A.C. 454 (P.C.). And if the rule should be discharged, it would seem that the Court will give the judge his costs, even though the result be that the applicant is thus



saddled with a double bill of costs: *In re Local Government Board; Ex parte Kingstown Commissioners* (1885), 16 L.R. (Ir.) at p. 160.

On the other hand, if the judge of the inferior Court appeared unnecessarily, or if he has been guilty of misconduct below, it is surmised that the Court might visit him with costs, or at any rate refuse him his costs, though successful, upon the analogy of cases like *R. v. Meyer* (1875), Q B.D. 173, and *R v. Thornton JJ.* (1898), 67 L.J.Q.B. 249.

**Non-parties—Solicitor.**—In several cases in the Mayor's Court, where the solicitors, in the teeth of decisions such as *Robinson v. Emanuel*, L.R. 9 C.P. 414, persisted in bringing suits in the Mayor's Court, in spite of the lack of jurisdiction, the solicitors were visited with the costs of the prohibitions to restrain such actions: *In rem*, L.R. 9 C.P. 751; *Gold v. Turner*, L.R. 10 C.P. 149.

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